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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 402

THE UNITED STATES OF AMERICA, PETITIONER

vs.

GUARANTY TRUST COMPANY OF NEW YORK ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 17, 1929
CERTIORARI GRANTED OCTOBER 21, 1929

SUPREME COURT OF THE UNITED STATES

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A [Caption omitted.]

1 In United States District Court

District of Minnesota, Fourth Division

MINNEAPOLIS STEEL & MACHINERY COMPANY, COMPLAINANT
vs.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, DEFENDANT

Bill of complaint

Filed July 26, 1923

Comes now the above-named complainant and for itself and all others similarly situated who may desore to become complainants files this its bill of complaint asking for the appointment of a receiver or receivers for the Minneapolis & St. Louis Railroad Company, and states, alleges, and pleads, as follows:

(Paragraphs 1 to 9 omitted.)

10

That defendant is insolvent and unable to pay its debts already due and will be unable to meet its obligations immediately falling due. That it has no funds on hand at its disposal to meet its immediate and pressing needs and is without credit whereby it can borrow money for such purposes. That it is now indebted to the complainant in excess of the sum of $15,000 for labor performed and for goods, wares, and merchandise which sum is now past due and owing.

(Paragraphs 11 to 18 omitted.)

MINNEAPOLIS STEEL & MACHINERY COMPANY,
By EDWIN A. MERRILL,
President.
COBB, WHEELWRIGHT, HOKE & BENSON,
Counsel.
ALBERT C. COBB & JOHN C. BENSON,
Solicitors for Complainant.

2 [*Duly sworn to by Edwin A. Merrill; jurat omitted in printing.*]
(*All in italics.*)
[File indorsement omitted.]

In United States District Court

Answer

Title omitted.

Filed July 26, 1923

The defendant in the above-entitled cause enters its appearance therein and for answer to the petition of said complainant or unto

so much and such parts thereof as the defendant is advised it is necessary or material to answer, says:

PAR. 1. That it admits the statements and allegations in said petition contained, and waives the service of all notices herein.

PAR. 2. That it joins in the prayer of said petition and, to the end that its duties and obligations to the public as a common carrier may not be interfered with, and that the rights and interests of all its creditors be subserved and protected, asks that a receiver be forthwith appointed to take immediate charge and possession of the railroad, property, and business in said petition referred to or mentioned, with full power and authority to manage, operate, preserve, protect, and control the same and otherwise have and exercise
3 all the powers and perform and discharge all the duties granted to or imposed upon receivers in like or similar cases; that, upon the final hearing of this cause, the court will make and enter such decree or decrees, with respect to the business and property of this defendant and the disposition thereof, as may be just and equitable to all concerned; that the court will cause all rights and claims in equity of persons interested in said railroad, business, and property and the operation thereof to be ascertained, determined, and defined; and that the proceeds arising from any sale or sales or other disposition of said property and business be applied under the orders or decrees of the court according to the rights, interests, and equities of the persons therein interested.

THE MINNEAPOLIS & ST. PAUL RAILROAD COMPANY,
By DONALD EVANS, *Its Solicitor.*

[File indorsement omitted.]

In United States District Court

Report of Howard S. Abbott, special master, upon the claims of the United States of America et al.

Filed Aug. 13, 1928

To the honorable the District Court for the district and division and in the cause above entitled.

On the 20th day of August, 1923, an order was made and entered in the above-entitled cause by Hon. Wilbur F. Booth, one of the judges of this court fixing the time within which claims against the Minneapolis & St. Louis Railroad Company should be filed with the undersigned as special master and further providing for hearings upon said claims as filed and for a report upon the claims, accounts, and demands which should be so filed and heard; that notice for the filing of claims was published by the undersigned as required by said order of August 20, 1923. The report of the undersigned with reference to the publication of said notice as required by the order is on file and of record with the clerk of said court, and to which,

as well as the order of August 20, 1923, reference is hereby made for greater particularity in respect to the manner of filing claims and their determination by the undersigned as special master. That the time for filing was subsequently extended by order of this court to and including the first day of March, 1924.

4 Statement of case with findings of fact and conclusions

I would find that pursuant to the directions of said notice and under the authority of said orders and of the special orders entered later the claimants, as hereinafter stated, duly filed their claims with the undersigned, based upon the alleged indebtedness or liabilities as fully set forth in said claims and as hereinafter stated. That a hearing upon said claims was fixed for January 25, 1927, and notice thereof was duly mailed to counsel for the claimants and the parties to this cause. That on application of counsel for the various trustees, parties to this cause, the hearing upon said claims was continued until November 28, 1927. That on said day the hearing was further adjourned to February 7, 1928, on application of counsel for the various trustees parties to this cause. On February 7, 1928, the hearing on said claims was again continued on application duly made by counsel for the United States of America to March 7, 1928; on that day it was again continued on motion of counsel for the United States to April 4, 1928, and on that day hearing upon the claims was again continued upon motion of counsel for the United States and until May 21, 1928, at the hour of ten o'clock in the forenoon. At this time, pursuant to adjournment and also to notice duly given, a hearing was had in Minneapolis, Minnesota, in courtroom No. 2 at the hour of ten o'clock in the forenoon on the claims hereinafter listed. That a record and transcript of proceedings had before me at said time and place to which is attached a copy of the notice of hearing as thus given with the affidavit of service thereof is herewith filed by me under separate cover and with a certificate of its accuracy and completeness. Said record and transcript recites in full the appearance of counsel for the parties and claimants on May 21, 1928, and the proceedings then had and now upon the files and record in this cause and said claims with papers attached as filed with me and the answers and objections thereto, if any, as submitted by the receiver or any of the parties in this cause, and the contentions and arguments of counsel or other parties upon the various questions suggested and raised I herewith submit my findings of fact and conclusions of law.

I would find that five claims were heard and considered by me on said May 21, 1928, and as follows:

My No. 1827, United States of America, claimant.

My No. 2700, United States of America, claimant.

My No. 3268, James C. Davis, Director General of Railroads, claimant.

5 My No. 4153, United States Collector of Internal Revenue for the District of Minnesota, claimant.
My No. 4186, United States of America, claimant.

Claim No. 1827

I would find the facts relating to this claim to be as follows: November 14, 1923, in the District Court of the United States for the Northern District of Illinois a certain cause was pending in the District Court No. 8120 wherein the United States of America was complainant and the Minneapolis & St. Louis Railroad Company was defendant. The charge in the case being a violation of the quarantine act by said Minneapolis & St. Louis Railroad Company on April 2, 1921. To this charge a plea of guilty was entered and a fine of $100.00 was imposed, due and payable as of November 14, 1923. The answer of the receiver admitted the indebtedness and the facts as stated in the proof of claim filed with the master. A preference and priority was asserted with respect to the payment of this claim by the claimant, and to which assertion of priority in payment and to the claim in question H. H. Sheriff duly filed an objection and answer and the Guaranty Trust Company on behalf of itself and other trustees also filed an objection and answer to the claim of preference in payment. I would find that there is due and owing to the United States of America from the Minneapolis & St. Louis Railroad Company on account of the fine so imposed the sum of $100.00.

Claim No. 2700—Filed December 26, 1923

The proof of claim for this number was filed with the master on December 26, 1923, and asserted an indebtedness to the United States of a total of $3,411,673.51, exclusive of interest. The claimant asserted a priority and preference with respect to the payment of this claim, based upon section 3466, Revised Statutes, United States, section 6372, U. S. Compiled Statutes. This total comprised the following items:

(1) A promissory note of the Minneapolis & St. Louis Railroad Company for $1,382,000.00, dated April 2, 1921, with interest at the rate of 6% per annum, payable semiannually on the 1st day of April and October in each calendar year until full payment of the principal sum. This note was given by the carrier to the United
6 States of America pursuant to the provisions of section 210 of the transportation act of 1920, as amended, and certificate No. 81 of the Interstate Commerce Commission and represented a loan made by the United States to the railroad company of the face of the note for the purpose of paying a mortgage for $1,382,000 known as the Pacific Extension Mortgage of the Minneapolis & St. Louis Railroad Company theretofore duly executed by said company and maturing on April 1, 1921. This note was secured by a deposit of collateral by the railroad company of $2,377,000.00 principal

amount of the refunding and extension mortgage, 50 year, Series "A," 5% gold bonds of the Minneapolis & St. Louis, dated January 1, 1912, and due in 1962. Interest upon this note was duly paid up to and including the interest payment on April 1, 1923. I would find there is due and owing to the United States of America from the Minneapolis & St. Louis on account of the indebtedness evidenced by said promissory note as follows: The principal sum of $1,382,000.00

(2) Item 2 of the proof of claim was based on a promissory note issued by the National Railway Service Corporation, as maker to the United States, or order of the Secretary of the Treasury, as payee, in the principal amount of $386,190.00 (since reduced), dated July 1, 1921, due June 1, 1936, with interest at the rate of 6% per annum payable semiannually on the 1st days of June and December in each calendar year and until payment of the principal sum, bearing the unrestricted endorsement and guaranty of the Minneapolis & St. Louis Railroad Company as to principal and interest. The promissory note represented a loan to the National Railway Service Corporation for the benefit of the carrier pursuant to the provisions of section 210 of the transportation act of 1920, as amended. The note was secured by deferred lien certificates of the corporation in the principal amount of $386,190.00 (since reduced), dated June 1, 1921, due June 1, 1936, with interest at the rate of 6% per annum, payable semiannually on the 1st days of June and December in each calendar year and until payment of said principal sum and by other collateral hereinafter described. These deferred lien certificates were issued pursuant to the provisions of contract No. 2 entered into by the carrier under equipment trust agreement, Series "A," lease basis, dated June 1, 1921, executed by the National Railway Service Corporation to the Bankers Trust Company of New York as trustee.

This obligation was issued and the indebtedness arose in connection with the purchase of engine equipment under cir-
7 cumstances briefly stated as follows (Government's Exhibit No. 4): Additional engine equipment was necessary and desired in connection with the operation of the Minneapolis & St. Louis Railroad. Arrangements for the purchase of such equipment were made by the Director General of Railroads in connection with the National Railway Service Corporation, the Bankers Trust Company of New York, as trustee, and the Minneapolis & St. Louis Railroad Company. Fifteen engines were purchased, the original cost of which was approximately $965,475.00. The payment of this amount, with interest was distributed over a period of fifteen years. The principal with accrued interest upon partial payments to the date of maturity was computed in the amount of $1,592,250.00, which with an initial payment of $1,783.75 made the total cost of the equipment $1,593,033.75 including interest. The total principal and interest sum of $1,592,250.00 was then divided into equal rental note payments, so-called, covering the period of fifteen years, payable in semiannual instalments of $53,075.00 due May 20th and November

20th of each year. These rental notes, so-called, were duly executed by the Minneapolis & St. Louis Railroad Company in favor of the National Railway Service Corporation. Of the principal required to pay the original cost of $965,475.00 the United States of America advanced to the National Railway Service Corporation 40% of the sum, or $386,190.00 (since reduced), and the remainder or 60% was raised by the National Railway Service Corporation from private sources. To secure this advance of $386,190.00 the National Railway Service Corporation gave its note to the Secretary of the Treasury for that amount (this note is the one involved in item No. 2 of Government's claim No. 2700). As additional security this note was duly endorsed and guaranteed by the Minneapolis & St. Louis Railroad Company. It was also secured by a second lien upon $1,500,000.00 of the Minneapolis & St. Louis Refunding and Extension 5% bonds previously deposited as collateral security for the payment of the two notes dated May 27, 1922, and April 1, 1923, for $625,000.00 each and which constitute items No. 3 and No. 4 of the Government's claim No. 2700. In connection with the financing of the purchase by the National Railway Service Corporation it issued, through the Bankers Trust Company of New York, as trustee, trust certificates to the amount of 60% of the total trust notes as prior lien certificates, and the balance, or 40%, known as deferred lien certificates. With the Government was deposited as additional security for the note of $386,190.00, the 40% of deferred lien certificates.

8 The amount of the rental notes due the National Railway Service Corporation from the Minneapolis & St. Louis and outstanding on July 26, 1923, was $1,379,950.00, and the amount outstanding on September 30, 1926, was $1,061,500.00. These notes were secured by an equipment lease or trust agreement of the usual type covering fifteen Mikado type locomotives, Class M–1–46 (3), bearing Minneapolis & St. Louis numbers 620 to 634 inclusive.

The record discloses that this equipment trust contract was duly adopted by the receiver as his own and further that by order of court all payments falling due from time to time have been promptly made by the receiver on behalf of the railroad company and that at this time there has been no default in the payment of any of said rental notes falling due May 20th and November 20th of each year. That the note of $386,190.00 (since reduced) was one given directly by the National Railway Service Corporation to the United States of America and that the liability of the Minneapolis & St. Louis Railroad Company thereon is that of an endorser only. That no notice of any failure or default with respect to the same on the part of the National Railway Service Corporation its maker has been given to the Minneapolis & St. Louis or any one authorized to receive the same on its behalf. And further, the note of $386,190.00 is by its express terms not yet due and there has been no default in the performance of any of the conditions thereof by the National Railway Service Corporation or by the Minneapolis & St. Louis as endorser. I would

therefore find that there is nothing due at this time to the United States of America from the Minneapolis & St. Louis Railroad Company or its receiver with respect to the obligation and the transactions stated in detail in item No. 2 of the proof of chaim—i. e., the note of the National Railway Service Corporation in favor of the Secretary of the Treasury for $386,190.00 (since reduced).

(3) Item 3 (Government's Exhibit No. 1) of this claim is a promissory note for $625,000.00 given to the Director General of Railroads by the Minneapolis & St. Louis Railroad Company, dated May 27, 1922, due March 1, 1930, and with interest at the rate of 6% per annum, payable semiannually on the 1st days of April and October in each calendar year, until payment of said principal sum. This obligation represents indebtedness incurred in the operation of the Minneapolis & St. Louis Railroad Company to the United States of America due at the termination of Federal control
9 and which was funded pursuant to the provisions of section 207 of the transportation act, 1920. This note was secured by a deposit of collateral of $1,500,000.00, principal amount of the refunding and extension mortgage, 50 year, Series "A," 5% gold bonds of the Minneapolis & St. Louis Railroad Company, dated January 1, 1912, and due in 1962. I would find that the interest upon this note has been paid up to and including the installment of interest due on April 1, 1923. I would also find there is due to the United States of America from the Minneapolis & St. Louis on account of the indebtedness represented by this note the principal sum of $625,000.00.

(4) Item 4 (Government's Exhibit No. 2) of this claim is represented by a promissory note for $625,000.00, dated April 1, 1923, due on demand, given to the Director General of Railroads by the Minneapolis & St. Louis Railroad Company and with interest at the rate of 6% per annum, payable semiannually on the 1st days of April and October, in each calendar year and until payment of said principal sum. This note represents indebtedness incurred in the operation of the Minneapolis & St. Louis, to the United States of America, due at the termination of Federal control and funded pursuant to the provisions of section 207 of the transportation act of 1920. This note was secured by a deposit of collateral, junior to the note referred to in the preceding paragraph of $1,500,000.00 principal amount refunding and extension mortgage, 50 year, Series "A," 5% gold bonds of the Minneapolis & St. Louis Railroad Company, dated January, 1912, and due in 1962. The interest upon said note has been paid in full up to and including April 1, 1923. I would find there is now due and owing to the United States of America from the Minneapolis & St. Louis Railroad Company the principal sum of $625,000.00.

(5) Item 5 (Government's Exhibit No. 6) of this proof of claim is based upon twelve promissory notes for $33,600.00 each, given by the Minneapolis & St. Louis to the Director General of Railroads

and in the total sum of $403,200.00, dated January 15, 1920, and maturing successively on the 15th days of January, 1924 to 1935, inclusive, with interest at the rate of 6% per annum, payable semi-annually on the 15th days of January and July in each calendar year and until full payment of the principal sum. The promissory notes given are based upon the purchase of equipment allotted to the carrier, the Minneapolis & St. Louis, during Federal control pursuant to the provisions of the act of Congress approved November 10 19, 1919, issued under equipment trust agreement, dated January 15, 1920. The details respecting the purchase of this equipment are briefly as follows:

Director General of Railroads equipment trust notes, in the principal sum of $1,512,000.00, dated January 15, 1920, maturing at the annual rate of $100,800.00, payable January 15th, of each year. There were outstanding July 26, 1923, $1,209,600.00 and on September 30, 1926, $907,200.00. The interest for this series was fixed at 6% per annum payable January and July 15th, of each year. The initial payments in connection with this contract were $6,282.19, making a total cost for the series of $1,518,282.19, exclusive of interest. The issue was secured by equipment lease, to the Guaranty Trust Company of New York as trustee, of three hundred 40-ton steel underframe box cars, bearing Minneapolis & St. Louis numbers, commencing at No. 22,000 and continuing, even numbers only, consecutively to No. 22,598, inclusive, and two hundred fifty 50-ton composite gondola cars, bearing Minneapolis & St. Louis numbers, commencing at No. 27,001 and continuing, odd numbers only, consecutively to No. 27,499, both inclusive.

It appears from the record that the equipment trust contract in question was adopted by the receiver as his own and that by direct and express orders of the court in this cause the interest payments and the principal notes as they matured have been paid by the receiver for and on behalf of the Minneapolis & St. Louis, and that at this time there has been no default in the payment of the principal of said notes as they became due, nor in the payment of the interest upon the unmatured obligations. That none of the notes of this series remaining unpaid are by their express terms due and that there has been no default in the conditions of the obligations themselves or of the equipment trust agreement in connection with which they were issued. I would therefore find that there is nothing due at this time to the United States of America from the Minneapolis & St. Louis Railroad Company or its receiver with respect to the obligations and transactions stated in detail in item No. 5 of the proof of claim in claim my No. 2700.

Claim No. 3268

This claim was filed by the Director General of Railroads for the sum of $85.35 on account of the Minneapolis & St. Louis Railroad Company's proportion of loss and damage claims in connection

11 with the interchange of traffic between the Northern Pacific Railway Company and the Minneapolis & St. Louis Railroad Company. That the receiver in his answer to this claim admitted a liability and indebtedness in the amount as claimed, and I would therefore find there is due and owing to the Director General of Railroads, United States Railroad Administration, the sum of $85.35. A priority and preference was alleged with respect to the payment of this claim under section 3466 of the Revised Statutes of the United States.

Claim No. 4153

Claim No. 4153 was filed for and on behalf of the United States by the collector of internal revenue of the State of Minnesota, alleging an overpayment in tax adjustments under section 253 of the revenue act for 1921 as between the Minneapolis & St. Louis and the United States of America. Preference with respect to the payment of this claim was alleged by the claimant. The record discloses the fact that the claimant had received an excess of moneys from the Minneapolis & St. Louis Railroad Company rather than a deficiency. That the amount of such excess had been repaid to the Minneapolis & St. Louis and that the claim had been by reason of such adjustment and settlement withdrawn. I would therefore find that there is nothing due the United States of America with respect to the matters set forth in claim No. 4153.

Claim No. 4186

This claim is based upon an alleged indebtedness to the United States of America as evidenced by a determination of the Interstate Commerce Commission under date of April 14, 1924, finance docket No. 632, and in the sum of $292,022.23. (Government's Exhibit No. 7.) It represents the alleged overpayment by the Government in connection with the adjustment of accounts with respect to the guaranty under section 209 of the transportation act of 1920. It appears that an aggregate amount of $2,150,000.00 was certified for payment as advances under paragraph "h" and an aggregate amount of $490,000.00 was certified as a partial payment under paragraph "g" of section 209, as amended by section 212. The total amount found by the commission as necessary to make good the guaranty of section 209 of the transportation act was $2,347,977.77. A total of $2,640,000.00 having been certified for payment and paid, an overpayment in the amount of this claim resulted. It appears from the record that the formula fol-

12 lowed by the commission in arriving at the amount of the guaranty was disputed by the Minneapolis & St. Louis and its receiver and that litigation is pending for the purpose of readjustment of this formula or basis in accordance with the views of the railroad company. The correctness of the adjustment as

made by the Interstate Commerce Commission is a question which the master considers as not coming within his jurisdiction. It was agreed at the time of the hearing upon this claim that the master should pass only upon the question of priority of payment as asserted by the Government, the amount of the claim so passed upon to be that as ultimately determined by the litigation referred to. The amount so alleged—namely, $292,022.23—not being admitted by the Minneapolis & St. Louis nor proved except through the introduction of Government's Exhibit No. 7, that being the official determination of the Interstate Commerce Commission upon the adjustment of accounts under the Government guaranty of sections 209 and 212.

I would also find that the construction of the Minneapolis & St. Louis Railroad Company (Minneapolis Company No. 1) was originally authorized in 1853 by an act of Legislature of the State of Minnesota. That on or about February 1, 1877, this company under lawful authority duly executed and delivered its mortgage or deed of trust dated February 1, 1877, to the Farmers' Loan & Trust Company of New York as trustee, wherein and whereby the Minneapolis Company granted, sold, conveyed, transferred, pledged, and set over to Farmers' Loan & Trust Company of New York as trustee the line of railway and properties therein described to secure an issue of $1,100,000.00 of first mortgage bonds, $950,000.00 of which are now outstanding and unpaid and constitute the valid, binding, and legal obligations of the present Minneapolis & St. Louis Railroad Company. That said mortgage was at that time duly recorded as required by law in each county in which the lines of railway and other properties of the mortgagor covered by said mortgage were situated or located and that by virtue of such recordation under statutory law said mortgage became a lien upon all the properties so mortgaged and that said lien continued to and still exists with full force and effect. This mortgage is commonly referred to as the Merriam Junction-Albert Lea mortgage.

In April, 1881, the Minneapolis & St. Louis, Minneapolis & Duluth, Fort Dodge & Fort Ridgely, and the Minnesota & Iowa Southern Railroad Companies consolidated under authority of
13 an act of Legislature of the State of Minnesota passed in 1881, forming Minneapolis Company No. 2, which existed from 1881 to the latter part of 1894. In 1888 this company defaulted in its obligations, passed into the hands of a receiver appointed by the Hennepin County District Court for the State of Minnesota, which receivership continued until the autumn of 1894, when a sale of the road was had and which ultimately passed into the hands of a reorganized company, Minneapolis Company No. 3, a new corporation.

I would also find that on or about November 2, 1894, the Minneapolis & St. Louis Railroad Company (Minneapolis Company No.

3), the new corporation, under lawful authority duly executed and delivered its mortgage or deed of trust to the Central Trust Company of New York as trustee (the New York Trust Company of New York, the present trustee), wherein and whereby the Minneapolis Company granted, sold, conveyed, transferred, pledged, and set over to said Central Trust Company of New York as trustee the line of railway and properties therein described to secure an issue of first consolidated mortgage gold bonds in the principal sum of $10,000,000.00, of which $5,282,000.00 were so issued and are now outstanding and unpaid and constitute the valid, binding, and legal obligations of the present Minneapolis & St. Louis Railroad Company. That said mortgage was at that time duly recorded as required by law in each county in which the lines of railway and other properties of the mortgagor covered by said mortgage were situated or located and that by virtue of such recordation under statutory law said mortgage became a lien upon all the properties so mortgaged and that said lien continued to and still exists with full force and effect.

February 1, 1895, Minneapolis Company No. 3 consolidated with the Minneapolis & St. Louis Railroad & Telegraph Company, a corporation of the State of Iowa, forming the Minneapolis & St. Louis Railroad Company of Minnesota and Iowa, a new corporation, or Minneapolis Company No. 4, which existed from 1895 to May 10, 1916.

I would also find that on or about December 22, 1898, the Minneapolis & St. Louis Railroad Company (Minneapolis Company No. 4), the new corporation, under lawful authority duly executed and delivered its mortgage or deed of trust to the Central Trust Company of New York as trustee (Central Union Trust Company of New York, present trustee), wherein and whereby the Min-
14 neapolis Company granted, sold, conveyed, transferred, pledged, and set over to Central Trust Company of New York as trustee the line of railway and properties therein described to secure an issue of $25,000,000.00 first and refunding mortgage bonds, $13,244,000.00 of which were issued and are now outstanding and unpaid and constitute the valid, binding, and legal obligations of the present Minneapolis & St. Louis Railroad Company. That said mortgage was at that time duly recorded as required by law in each county in which the lines of railway and other properties of the mortgagor covered by said mortgage were situated or located and that by virtue of such recordation under statutory law said mortgage became a lien upon all the properties so mortgaged and that said lien continued to and still exists with full force and effect.

I would also find that on or about January 1, 1912, the Minneapolis & St. Louis Railroad Company (Minneapolis Company No. 4), the new corporation, under lawful authority duly executed and delivered its mortgage or deed of trust dated January 1, 1912, to the Guaranty Trust Company of New York as trustee, wherein and whereby the Minneapolis Company granted, sold, conveyed, transferred, pledged,

and set over to the Guaranty Trust Company of New York as trustee the line of railway and properties therein described to secure an issue of $75,000,000 refunding and extension mortgage bonds, $8,895,000 of which were issued and are now outstanding and unpaid and constitute the valid, binding, and legal obligations of the present Minneapolis & St. Louis Railroad Company. That said mortgage was at that time duly recorded as required by law in each county in which the lines of railway and other properties of the mortgagor covered by said mortgage were situated or located and that by virtue of such recordation under statutory law said mortgage became a lien upon all the properties so mortgaged and that said lien continued to and still exists with full force and effect.

That on January 1, 1912, Minneapolis Company No. 4 purchased the Minnesota, Dakota & Pacific Railroad Company, the owner of about 229 miles of railway located in South Dakota, and on January 1, 1912, it also purchased the Iowa Central Railway Company, an Iowa corporation operating approximately 500 miles of railroad in the States of Iowa and Illinois.

That said Iowa Central Railway Company on or about August 1, 1888, under lawful authority duly executed and delivered its mortgage or deed of trust, dated August 1, 1888, to the Mercantile Trust Company of New York as trustee (Bankers Trust Company of New York, present trustee), wherein and whereby the Iowa Central Railway Company granted, bargained, sold, conveyed, transferred, pledged, and set over to the Mercantile Trust Company as trustee, the line of railway and properties therein described to secure an issue of $7,650,000.00 of its first mortgage gold bonds, all of which are now outstanding and unpaid and constitute the valid, binding, and legal obligations of the present Minneapolis & St. Louis Railroad Company. That said mortgage was at that time duly recorded as required by law in each county in which the lines of railway and other properties of the mortgagor covered by said mortgage were situated or located and that by virtue of such recordation under statutory law said mortgage became a lien upon all the properties so mortgaged and that said lien continued to and still exists with full force and effect.

That said Iowa Central Railway Company had also on or about August 16, 1901, under lawful authority duly executed and delivered its mortgage or deed of trust dated March 1, 1901 (effective August 16, 1901), to the Morton Trust Company of New York as trustee (Central Union Trust Company of New York, present trustee), wherein and whereby the Iowa Central Railway Company granted, bargained, sold, conveyed, assigned, transferred, pledged, and set over to the Morton Trust Company of New York as trustee the line of railway and properties therein described to secure an issue of its first and refunding gold bonds in the principal sum of $25,000,000.00, $7,156,000.00 only of which were issued and are now outstanding and unpaid and constitute the valid, binding, and legal obligations of the present Minneapolis & St. Louis Railroad Com-

pany. That said mortgage was at that time duly recorded as required by law in each county in which the lines of railway and other properties of the mortgagor covered by said mortgage were situated or located and that by virtue of such recordation under statutory law said mortgage became a lien upon all the properties so mortgaged and that said lien continued to and still exists with full force and effect.

On August 9, 1915, Minneapolis Company No. 4 purchased the properties of the Des Moines & Fort Dodge Railroad Company, an Iowa corporation operating approximately 140 miles of road in the State of Iowa. The Des Moines & Fort Dodge Railroad Com-
16 pany had previously and on or about the 1st day of January, 1905, under lawful authority duly executed and delivered its mortgage or deed of trust dated January 1, 1905, to Central Trust Company of New York as trustee (Central Union Trust Company, present trustee), wherein and whereby the Des Moines & Fort Dodge Railroad Company granted, bargained, sold, conveyed, assigned, transferred, pledged, and set over to Central Trust Company of New York, as trustee, the line of railway and properties therein described to secure an issue of $3,072,000.00 of its first mortgage bonds, all of which were issued and are now outstanding and unpaid, and constitute the valid, binding, and legal obligations of the present Minneapolis & St. Louis Railroad Company. That said mortgage was at that time duly recorded as required by law in each county in which the lines of railway and other properties of the mortgagor covered by said mortgage were situated or located and that by virtue of such recordation under statutory law said mortgage became a lien upon all the properties so mortgaged, and that said lien continued to and still exists with full force and effect.

On May 10, 1916, Minneapolis Company No. 4 consolidated with the Iowa Central & Western Railroad Company, an Iowa corporation, operating approximately 38 miles in the State of Iowa, forming the Minneapolis & St. Louis Railroad Company or Minneapolis Company No. 5, a new corporation, which constitutes the present system of railroad now operated by the receiver and which constituted the line of railroad operated by the United States during the period of Federal control, and in connection with the operation of which the items of asserted indebtedness of the United States originated and accrued.

That defaults in payment of interest or principal or in the performance of some mortgage obligations with respect to each of the mortgages above described, except the so-called Merriam Junction-Albert Lea mortgage, have taken place, and that pursuant to the terms and provisions of said mortgages the present respective trustees duly filed in this court their bills of complaint to foreclose said mortgages and each of them as fully appears in the printed record in this receivership proceedings, and to which reference is made for greater particularity. That the taking of evidence under said bills to foreclose, and each of them, has been completed, and that

the undersigned as master has made and filed his final report with respect thereto, and in which he found and now so finds that defaults have been made as alleged in said bills of foreclosure, that the said mortgages and each of them were duly executed under
17 lawful authority to secure the payment of the bonds as hereinbefore recited at length. That in said report the undersigned as master recommended that a decree of foreclosure and sale be entered and that the parties to the various bills of complaint be granted a judgment in accordance with the various prayers for relief contained therein. That said bonds were and now are the valid outstanding and lawful indebtedness of the present Minneapolis & St. Louis Railroad Company. That company under its agreement of purchase with the Iowa Central Railway Company and the Des Moines & Fort Dodge Railroad Company having assumed the payment of the bonds issued under the Iowa Central first mortgage, the Iowa Central first and refunding mortgage and the Des Moines & Fort Dodge first mortgage. That the said mortgages and each of them were at the time of their execution and delivery duly recorded as provided by law, and that thereupon said mortgages, and each of them, became a lien upon the railway and properties described therein, and that said lien has never been disturbed or destroyed, and continued to and still exists with full force and effect. That these mortgages, and each of them, had not yet matured at the time of the operation and control of Minneapolis & St. Louis Railroad Company (Minneapolis Company No. 5) by the United States and that the lien of said mortgages, and each of them, during all the time of said operation was in full force and effect.

That pursuant to an order of court dated August 20, 1923, and others subsequent thereto, made in cause 299 consolidated with 290, a large number of creditors including the United States, to wit: 4,500, having claims and demands against the Minneapolis & St. Louis Railroad Company, duly filed with the undersigned as special master their verified proofs of claims. That nearly all of these claims and accounts have been heard by the special master, and a large amount has been determined by him as entitled to a preference in payment. That at the hearing upon a group of claims, including the Albia Coal Company, the question was raised by counsel for claimants with respect to the diversion of funds by the Minneapolis & St. Louis from the payment of current operating expenses, within six months prior to the appointment of the receiver herein, to the liquidation of interest coupons falling due upon the mortgages involved in the six foreclosure cases now under consideration and other purposes which under the rule of law laid down in Fos-
18 dick vs. Schall, 99 U. S. 235, would constitute a fund for which in equity the trustees on a sale of the properties under foreclosure decree must account to and reimburse the parties entitled to payment. Evidence was presented upon the question of diversions, and the master subsequently filed a report in which he held that a large sum of money had been so diverted. Exceptions were filed to

this report, which were substantially overruled by the court, and later an appeal was taken from the order by the trustees of the six mortgages under foreclosure, the claimants and the Bennett and Bache committees. This appeal at the present writing has not been finally determined by the Appellate Court. If the decision of the District Court is affirmed, a substantial sum will be available under the doctrine of diversions for the payment of preferred claims of the character designated in Fosdick vs. Schall, supra.

I would also find that during the proceedings had at the time these claims were heard counsel for the Government stated in open court that the case of Mellon, Director General, vs. Michigan Trust Company, 271 U. S. 236, in which governmental priority was denied, would apply to claim No. 3268, and also to items Nos. 3 and 5 of claim No. 2700 for $625,000.00 each.

I would also find that the condition of the Minneapolis & St. Louis Railroad Company in July, 1923, was such as to establish a case of insolvency under the ruling made by the Supreme Court of the United States in the case of United States vs. Butterworth-Judson Corporation, 269 U. S. 504.

As further conclusions of law in addition to those already heretofore made and especially those in respect to the lien of the various mortgages executed by the constituent companies of the new corporation, at present the Minneapolis & St. Louis Railroad Company, I would find that the fund ultimately established, if any, through the doctrine of principle of diversions is a special one created and established exclusively and solely for the benefit of the preferred supply operating creditors whose claims were properly proven and allowed as such and that the United States of America nor James C. Davis, Director General of Railroads (Andrew Mellon, successor), are not entitled to participate in the distribution of this fund or of any part thereof.

That the various instruments of pledging under which the Minneapolis & St. Louis refunding and extension class "A" mortgage bonds and also other collateral were given to secure the payment of certain specified items or accounts in claims No. 2700 and
19 4186 are valid and subsisting and outstanding contracts and that the United States of America and James C. Davis, Director General of Railroads (Andrew Mellon, successor), are entitled to realize upon the securities so pledged in accordance with the terms and the provisions of said pledging instruments and that the claimant in each instance is entitled to enforce all the provisions thereof in accordance with their terms.

Claims or items allowed

Claim No. 1827

I would also find that there is due and owing to the United States of America on account of claim No. 1827, $100.00, and that it is

entitled to recover from the Minneapolis & St. Louis Railroad Company and its receiver the said sum of $100.00 as a special preference claim, to be paid out of the current net operating income of the receiver as a special charge thereon or from any other funds which may be available for such purpose.

Claims Nos. 2700, 4186, and 3268

I would also find that the United States of America is entitled to recover from the Minneapolis & St. Louis Railroad Company as a general account or liability from the securities deposited as collateral and pro rata with other claims of like class from such funds in the hands of the court in this cause as may now or hereafter be available for that purpose, without any preference or priority in payment except as to collateral security either against the corpus of the mortgaged properties or any other claim, class or classes of claims, account or accounts against the Minneapolis & St. Louis as duly filed in this cause or any of the parties hereto, the following sums found due and allowed by me. The total amount which it is entitled to recover from the proceeds of collateral and other sources shall not exceed, however, the total of the claims as allowed.

Claim No. 2700

On account of item No. 1 the principal sum of $1,382,000 without interest.

On account of item No. 3 of said claim the principal sum of $625,000.00 without interest.

On account of item No. 4 of said claim the principal sum of $625,000.00 without interest.

20 Claim No. 4186

That the United States of America is entitled to recover only as above stated, either from the Minneapolis & St. Louis Railroad Company or a purchaser at the foreclosure sale, on account of claim No. 4186 such amount, if any, as may ultimately be found due to the United States of America in the process of the litigation referred to in my findings of fact.

Claim No. 3268

That James C. Davis, Director General of Railroads (Andrew Mellon, successor), is entitled to recover from the Minneapolis & St. Louis Railroad Company on account of the indebtedness asserted in claim No. 3268 the sum of $85.35.

Claims or items disallowed

Claim No. 2700

That the United States of America is not now entitled to recover from the Minneapolis & St. Louis Railroad Company or its receiver

the asserted indebtedness alleged to be due in item No. 2 of claim No. 2700 for $386,190 (since reduced), and item No. 5 of my claim No. 2700 for $403,200 (since reduced) or any part thereof.

Claim No. 4153

That the United States collector or internal revenue for the district of Minnesota is not entitled to recover any sum or sums whatever on account of the indebtedness set out in claim No. 4153.

A memorandum stating my reasons for the above conclusions of law follows and in this respect may be considered a part of my report.

All of which is respectfully submitted.

HOWARD S. ABBOTT,
Special Master in Chancery.

Minneapolis, Minnesota, August 13, 1928.

In United States District Court

Memorandum opinion

Filed Aug. 13, 1928

The question of whether the Minneapolis & St. Louis Railroad Company is insolvent within the meaning of section 3466, U. S. Rev. Stat., section 6372 U. S. Comp. Stat., so as to establish the
21 right, other conditions permitting, of the United States to the priority in payment asserted in that section would seem to be settled by the case of the United States vs. Butterworth-Judson Corporation, 269 U. S. 504, and in which the opinion was written by Mr. Justice Butler. The facts are stated in the opinion and from that recital it would seem that the condition of the Minneapolis & St. Louis Railroad Company in July, 1923, was similar to that of the defendant corporation in the case above, where the court held that the respondent's answer admitting the allegations of the complaint and its consent to a decree appointing receivers would amount to the handing over of all of its properties and business to the receivers to be administered under the direction of the court as a trust fund to pay the debts of respondent or,

"in substance, the things done by respondent amounted to a voluntary assignment of all its property within the meaning of section 3466,"

and the court in that case held that the United States was entitled to priority. The syllabus of this case prepared by the court follows:

"Corporation in fact insolvent, which consented to appointment of receiver in suit wherein solvency, but mere inability to meet maturing obligations was alleged, held to have made a voluntary assignment for benefit of creditors, within Rev. Stat., sec. 3466, Comp. Stat., sec. 6372, giving priority to debts due the United States in cases of insolvency."

The five claims filed on behalf of the United States of America and heard by the master on May 21, 1928, except two, cover indebtedness incurred, directly or indirectly, during the period of Federal control or soon thereafter. In order to have the facts and question for determination clearly in mind, a brief statement of the amounts involved and the nature and character of the claims is pertinent. These claims were filed on behalf of the United States of America with the master on the dates stated and assigned the numbers given below.

Claim No. 1827

Claim No. 1827, filed December 7, 1923, for $100.00, based on fine imposed on plea of guilty by the United States District Court for the Northern District of Illinois for a violation of the quarantine act. Admitted.

22 Claim No. 2700

Claim No. 2700, filed December 26, 1923, comprising five items of asserted indebtedness.

(1) Promissory note for $1,382,000.00 made by the Minneapolis & St. Louis Railroad Company, Secretary of the Treasury, payee, dated April 1, 1921, due April 1, 1931, representing a loan to the carrier pursuant to the provisions of section 210 of the transportation act of 1920, as amended. Liability admitted.

(2) Promissory note of the National Railway Service Corporation, the United States of America or order of the Secretary of the Treasury, payee, for $386,190.00 (since reduced), dated July 1, 1921, due June 1, 1936, issued in connection with contract No. 2 entered into by the carrier under an equipment trust agreement, Series "A," lease basis, dated June 1, 1921, executed by the National Railway Service Corporation to the Bankers Trust Company of New York as trustee. Liability denied.

(3) Promissory note for $625,000.00 of the Minneapolis & St. Louis Railroad Company, Director General of Railroads payee, dated May 27, 1922, due March 1, 1930, representing indebtedness of the carrier to the United States at the termination of Federal control and funded pursuant to the provisions of section 207 of the transportation act, 1920. Liability admitted.

(4) Promissory note of the Minneapolis & St. Louis Railroad Company for $625,000.00, Director General of Railroads payee, dated April 1, 1923, due on demand and representing indebtedness of the carrier to the United States at the termination of Federal control and funded pursuant to the provisions of section 207 of the transportation act, 1920. Liability admitted.

(5) $403,200.00 (since reduced) evidenced by twelve promissory notes of the Minneapolis & St. Louis Railroad Company for $33,600.00 each, Director General of Railroads, payee, each dated January 15, 1920, and maturing successively upon the 15th day of Janu-

ary, 1924 to 1935, inclusive, representing equipment purchased and allotted to the carrier during the period of Federal control pursuant to the provisions of the act of Congress approved November 19, 1919, and issued under equipment trust agreement dated January 15, 1920. Liability denied.

23

Claim No. 3268

Claim No. 3268, filed January 2, 1924, for $85.35 on account of the Minneapolis & St. Louis Railroad Company's proportion of two loss and damage claims in connection with the interchange of traffic between the Northern Pacific Railway Company and the Minneapolis & St. Louis Railroad Company during the period of Federal control. Liability admitted.

Claim No. 4153

Claim No. 4153. Withdrawn by claimant.

Claim No. 4186

Claim No. 4186, filed under order of court May 26, 1924, for $292,022.23, representing alleged overpayment by the Government in connection with the adjustment of accounts with respect to guaranty under section 209 of the transportation act of 1920. Liability denied as to amount claimed.

Counsel for the Government upon the hearing conceded that claim 3268 should be allowed as a general liability only following Mellon, Director General vs. Michigan Trust Co., 271 U. S. 236, 46 Sup. Ct. Rep. 511.

Items 2 and 5 of the Government's claim, my No. 2700, for $386,190.00 (since reduced) and $403,200.00 (since reduced), respectively, are based upon equipment trust obligation incurred in the purchase or allocation of equipment during the period of Federal control or under the transportation act of 1920, as amended. These obligations are in the form of promissory notes. One for $386,190.00 (since reduced) given by the National Railway Service Corporation to the United States of America or order of the Secretary of the Treasury as payee, and which is not due until June 1, 1936, the other sum of $403,200.00 (since reduced), the aggregate of twelve promissory notes of $33,600.00 each, maturing successively on the 15th day of January, 1924 to 1935, inclusive. The interest upon these obligations and the principal of notes falling due has been promptly paid on maturity by specific and direct orders of the court in this receivership proceeding. The equipment trust contracts made before the receivership covering the equipment in question and for which the obligations were incurred were adopted by the receiver with the approval of the court; the relation therefor between the holder of the notes or obligations and the railroad company is a contract one, and the matuarity of the obligations was not accelerated

upon the passing of the road into the hands of the receiver.
24 No default having taken place either in respect to the conditions of the equipment trust agreements or the obligations themselves, these two items of claim No. 2700 are necessarily disallowed.

There remains, therefore, for further consideration and discussion three items of claim No. 2700, No. 1 for $1,382,000.00, No. 3 for $625,000.00, and No. 4 for $625,000.00 and claim No. 4186 for $292,022.23. The last three items—namely, Nos. 3 and 4 and claim No. 4186—are all based upon operations occurring during the period of Federal control and originated in connection with financial transactions arising out of the use of the system of railroad of the Minneapolis & St. Louis Railroad Company by the United States during Federal control. The conclusions reached as to the priority asserted under section 3466, Revised Statute, apply generally and especially to these three items as well as that for $1,382,000. Some reference to the facts pertaining to the claims other than item No. 1 for $1,382,000.00 will be stated more at length and separately. Item No. 1 of claim, my No. 2700, consists of a promissory note for $1,382,000.00, originally dated April 1, 1921, that date being changed subsequently to April 2, 1921, the first falling on Sunday. The period of Federal control terminated at 12.01 a. m. March 1, 1920, but by the transportation act of 1920 provision was made for the settlement and adjustment of all transactions and mutual accounts arising during the perior of Federal control between the Government and the carriers. In section 210 of that act as amended June 5, 1920, provision was made for the making of advances by the Government to carriers for the purpose of meeting maturing indebtedness. The circumstances under which this note was given are these: (June 1, 1881, the Minneapolis & St. Louis Railroad Company duly executed a mortgage, known as the Pacific extension mortgage, to the Empire Trust Company of New York as trustee, to secure its 6% gold bonds in the amount of $1,382,000.00. The bonds issued under this mortgage were secured by a first lien on 94.34 miles of road extending from Hopkins to Morton, Minnesota, and also a junior lien on 9 miles of road extending from Minneapolis to Hopkins, Minnesota. These bonds matured April 1, 1921, and under the provisions of section 210 the United States advanced to the Minneapolis & St. Louis Railroad Company $1,382,000.00, payable in ten years, and on that date it executed and delivered the promissory note for a like amount and referred to above. At that time also $2,377,000.00 par value of the Minneapolis & St. Louis refunding and extension bonds were deposited with the proper authority as collateral for the loan.
25 The interest on this note was paid by the railroad company up to and including the installment of interest due and payable on April 1, 1923. The nature and circumstances under which the asserted indebtedness originated for items No. 3 and 4 of claim No. 2700 for $625,000.00 each and claim No. 4186 for $292,022.23 sufficiently appear in the findings of fact.

The Minneapolis & St. Louis Railroad Company as operated by the Government and now in receivership is the result of consolidations and purchases by other railroad corporations which are now nonexistent, the last consolidation having taken place May 10, 1916. The claim of the United States is only against the present Minneapolis & St. Louis Railroad Company, and its asserted priority can be therefore only against the property of this company. The present company has never owned anything except an equity of redemption in its properties, subject to various mortgages as hereinafter stated, since all these mortgages were made by prior corporations. When received by the present company, the property so received was already subject to these liens. Stated differently, all of the constituent lines of the present Minneapolis & St. Louis operated by the Government during the period of Federal control had long prior to that period duly executed mortgages upon either portions of the present system or the entire road, which had been duly recorded pursuant to the laws of different States, and the debt evidenced by the bonds issued under the mortgages had become a lien upon the property specified therein. There is no question with respect to either the facts or the law in this respect.

The mortgages thus executed, with the dates of execution, are the Minneapolis & St. Louis Merriam Junction-Albert Lea, dated February 1, 1877; first consolidated, dated November 1, 1884; first and refunding, dated March 1, 1899, and refunding and extension, dated January 1, 1912; Iowa Central first mortgage, dated June 1, 1888, and first and refunding mortgage, dated March 1, 1901; and the Des Moines & Fort Dodge first mortgage, dated January 1, 1905. No one of these mortgages at the date of the appointment of the receiver, on July 26, 1923, was due and payable. No one of them had been satisfied or discharged of record and all of them are still liens with varying degrees of priority upon the properties of the present Minneapolis & St. Louis Railroad Company or a part thereof.

The asserted indebtedness of the United States upon which
26 its claims, except Nos. 1827 and 3268, are based, are evidenced by promissory notes or certificates of indebtedness, the earliest in point of time being the equipment trust notes, January 15, 1920. The indebtedness for which these obligations were given in liquidations arose out of an advance by the United States to the railroad company, the purchase of equipment and the adjustment of financial transactions as between the Government and the railroad company all occurring during the so-called period of Federal control or soon thereafter. One claim, No. 4153, based upon an alleged underpayment on account of internal revenue, was withdrawn.

It is clear that the mortgage debts above noted constituted and for many years prior to the transactions between the United States and the railroad company had constituted and were liens upon the property of the Minneapolis & St. Louis, established and created by law under the recording provisions of the different States. These mort-

gages, dated from February 1, 1877, to January 1, 1912, were and have been since the date of their respective execution lawfully created, valid, binding, and existing obligations, and the bonds issued pursuant to the provisions thereof are in the hands of numerous bona fide holders for value and who are legally entitled to the lien and security of the mortgages so executed. There is no question but that the debts due the mortgage creditors are liens upon the properties of the railroad company.

July 26, 1923, W. H. Bremner was duly appointed receiver for the Minneapolis & St. Louis Railroad Company. On August 20, 1923, an order was made which provided for the filing with the undersigned as special master the claims of all creditors of the Minneapolis & St. Louis other than those secured by mortgage. Later orders were made which referred to the undersigned as special master for hearing and determination all questions arising in connection with the proceedings brought to foreclose the mortgages above noted with the exception of the Merriam Junction-Albert Lea mortgage.

Pursuant to the order of August 20, 1923, the United States of America duly filed with the master five claims which were assigned by him the following numbers: 1827, 2700, 3268, 4153, and 4186, the date of filing being, respectively, December 7, 1923; December 26, 1923; January 2, 1924; April 10, 1924 (filed under order of court); and May 26, 1924 (filed under order of court).

The dates when the asserted indebtedness or liability, the basis of these five claims, originated being, claim No. 1827,
27 April 2, 1921; claim No. 2700, item 1, April 2, 1921; item 2, July 1, 1921; item 3, May 27, 1922; item 4, April 1, 1923; and item 5, January 15, 1920; claim No. 3268, February 18 and March 18, 1920; and claim No. 4186, date certificate, April 14, 1924. Claim No. 4153 withdrawn.

By comparing these dates with those of the execution of the various mortgages referred to it is beyond dispute that the lien of even the latest mortgage was created and in force long prior to the time when the indebtedness between the United States and the railroad company accrued.

The facts involved are substantially conceded, the principal questions of law before the master are few in number and may be stated briefly as follows:

(a) Whether the United States is entitled to a priority or preference in payment, and,

(b) If entitled to a priority, what is the relative priority as against,

(1) The debt secured by the specific and vested lien of prior recorded mortgages;

(2) The fund which may be established through the doctrine of diversions, and,

(3) The other unsecured creditors of the railroad company.

The King's prerogative, scope, and extent

The King's prerogative as existing in the earliest times and as stated in Coke's case was almost unlimited with respect to the collection of debts due the Crown. It must be remembered, however, that the King's priority with reference to debts due the Crown was substantially modified by 33 Hen. 8 C. 39, and this statute was in force in England at the time of our independence. There are many English cases discussing the question of relative priorities as between the King and a subject, but one only may be cited as illustrating the principles followed in these decisions, namely, that of Giles v. Grover, 9 Bing. 128. In this case opinions were delivered by a number of judges sitting, and among them Patteson and Alderson. Justice Patteson, after referring to the rule which gave the King priority in the case of concurrent debts, said (p. 139):

"In this respect it differs from all cases of special property and charges on goods created by the debtor while he has the
28 absolute dominion over the goods. It is conceded that the Crown can not avoid an equitable mortgage, Casberd v. Attorney General, 6 Price 411; or the lien of a factor, The King v. Lee, 6 Price 369; or of a wharfinger, The King v. Humphrey, 1 McCleland & Younge 173; or a bona fide assignment in trust for creditors, The King v. Watson, West on Extents 115, or any other similar assignment or charge because they are created when the debtor has legal power and authority to create them and attach upon the goods before the process of the Crown, and the Crown can only take the goods subject to such liabilities as the debtor has legally created."

Justice Alderson in the same decision said on the same point:

"If, however, the right of the subject be complete and perfect before that of the King commences it is manifest that the rule does not apply, for there is no point of time at which the two rights are in conflict; nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already."

In United States v. State Bank of North Carolina, 6 Peters 29, Mr. Justice Story in writing the opinion said:

"The right of priority of payment of debts due to the Government is a prerogative of the Crown, well known to the common law. It is founded, not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens and discharge the public debts. The claim of the United States, however, does not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statutes. The same policy which governed in the case of the royal prerogatives may be clearly traced in these statutes."

The soundness of the principle that even the King's right of priority could not displace the prior vested right or lien of a subject was stated by our own Supreme Court in Marshal v. People of the State of New York, 254 U. S. 380, where the question of the priority of the State of New York out of the general assets of a debtor over other creditors was based upon the common law and the court there said in discussing the prior right of the State of New York, as a sovereign and prerogative right:

"At common law the Crown of Great Britain, by virtue of a prerogative right, had priority over all subjects for the
29 payment out of a debtor's property of all debts due it. The priority was effective alike whether the property remained in the hands of the debtor, or had been placed in possession of a third person or was in custodia legis. The priority could be defeated or postponed only through the passing of title to the debtor's property, absolutely or by way of lien, before the sovereign sought to enforce its right."

No common law in Federal courts

It is conceded that in the Federal courts there is no common law, and it is only necessary to cite a few cases supporting this principle.

United States v. State Bank of North Carolina, 6 Pet. 29.

Stripe v. United States, 269 U. S. 503.

Mellon v. Michigan Trust Company, 271 U. S. 236, affirming Davis v. Michigan Trust Company, 2 Fed. (2) 194.

Equitable Trust Company v. Connecticut Brass & Mfg. Corp., 290 Fed. 712.

Liberty Mutual Insurance Company v. Johnson Shipyards Corp., 6 Fed. (2d) 752.

United States v. Middle States Oil Corp., 18 Fed. (2d) 231.

Since the United States has no common law, whatever right of priority in the payment of debts the United States has over other creditors is there because of some statute which confers it. The right of priority does not exist independently of statute. To remedy the absence of the right of the sovereign to priority, the first Congress passed an act giving to the United States a right to priority of payment over other creditors in the case of bonds given by public officers for the collection of duties. It was dated July 1, 1789, and was entitled, an "Act to regulate the collection of duties imposed by law, etc.," and then declared that in all cases of insolvency or where a debtor's estate in the hands of executors or administrators should be insufficient to pay all the debts due from the deceased the debts of the United States should be first satisfied. The act of March 3, 1797, with some slight verbal changes which do not alter its meaning is embodied in section 3466 U. S. Rev. Stat. and section 6372 U. S. Comp. Stat. This section in so far as affects the present claims of the United States can be quoted as follows:

"Whenever any person indebted to the United States is in-
30 solvent or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well as to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

This section makes the United States a privileged creditor. It is, so far as the law goes, but no further. It is not a prerogative superseding the title or the vested liens of others on the properties of a debtor. The claims in question, except one and one withdrawn, are not for taxes due the United States or for a debt which partakes to any extent or in any degree of that character. One claim is for a simple advancement or loan of money made pursuant to law for the purpose of enabling the Minneapolis & St. Louis to meet a maturing obligation. The others are for obligations given by the United States in adjustment of financial transactions between the United States and the Minneapolis & St. Louis originating while the Government was operating its properties as an owner under emergency legislation passed in connection with the late war.

Priority sections do not create a lien

It is also conceded that this section does not give the United States a lien upon its debtors' property, but only a right to a priority of payment out of the same in certain cases. In support of this rule it is only necessary to cite, United States vs. Fisher, 2 Cranch, 358, opinion by Chief Justice Marshall, and to note that this decision on this point has been invariably and uniformly followed in all decisions of the Federal courts. The section gave only to the United States a priority of payment out of the property or assets of the insolvent debtor after it has passed by voluntary assignment or by operation of law to a third person for the benefit of creditors. It is equally clear that any creditor including the United States can participate in the distribution of properties or funds belonging to the Minneapolis & St. Louis Railroad Company in the hands of its receiver and as to which he has the right or power of disposal and that if on this property in the hands of the receiver a prior vested lien has attached that property must be disposed of or taken by creditors subject to the liens, whatever they may be. Again, the priority of the United States, it is conceded, does not con-
31 stitute a lien at the time the debt to the United States originated, but leaves the power of alienation free either in the creation of a lien or an alienation either total or partial. If the lien be an alienation to the amount of a debt incurred by the debtor prior to insolvency, then clearly, for the amount of that lien the

priority of the United States can not attach and the same effect must be produced whether the lien be created by the act of the party or by the operation of law.

Review of priority decisions

Up to this point the argument against priorities has been based upon the nature and extent of the sovereign right to priorities as construed by English decisions, the nonexistence of common law in the Federal courts, the passage of the act of 1797 to supplement the absence of a sovereign right of priorities and the holdings that the statute in question never did nor does it now create or establish a lien. Let us consider now the cases decided by the Federal courts, particularly those of the Supreme Court of the United States, construing and explaining the statute, section 3466, in question. In spite of the statement of counsel for the Government to the contrary it can be fairly said that no decision of the Federal courts has ever held that section 3466, U. S. Rev. Stat., gives the United States a priority right for payment which would displace a valid, specific, and existing lien upon the property of the debtor, created prior to the debt due the United States, either by the debtor when he had the power of control or by act of law. The thought itself, that this could be done, is repugnant to all rules or principles of equity. The fundamental principle is well stated in the Giles vs. Grover case, supra, where Judge Alderson said:

"Nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already."

The statute provides that the debts of the United States must be first satisfied, but out of what? And the answer is, out of property of the debtor, out of the interest of the debtor only in his property, out of that only which he owned at the time of the insolvency, and he only owned that which was free from the impress of the law which had created a right or interest in others secured by lien. Any interest which the debtor had conveyed while he had legal control, by way of conveyance, mortgage, or other lawful act, clearly can not be considered as the property of the debtor. That interest,
32 which was covered by a lien created by his own act or through operation of law he did not own, it was not his; it was a tangible something that had passed beyond his control and reach, beyond his power of distribution, and of which he had been lawfully divested.

Considering the earlier cases in the Supreme Court of the United States and first that of The United States vs. Hooe, et al., 3 Cranch 73.

That part of the opinion in United States vs. Hooe et al., 3 Cranch 73, which holds that the priority of the United States under section 3466 does not supersede a valid mortgage given by the debtor before his insolvency has been asserted by the counsel for the Govern-

ment as dictum and also as based upon the theory that a mortgage operated as divesting the title of the mortgagor. Neither point is well taken, in my judgment. More than a brief examination of this case is apparently necessary. The opinion was written by Chief Justice Marshall and decided and rendered in 1805. The material facts in the case as found by the court are concisely stated as follows:

One Fitzgerald upon being appointed collector of internal revenue executed a bond to the United States with Hooe as surety in the penalty of $10,000.00 for the faithful performance of the duties of his office. In 1798 he was found to be greatly in arrears, and upon a final adjustment of his accounts the balance against him was over $57,000.00. In 1799 Hooe, having knowledge that Fitzgerald was largely indebted to the United States, but believing that he had sufficient property to discharge the debt, and Fitzgerald being desirous of borrowing money from the Bank of Alexandria to meet the drafts of the Treasury of the United States and for other purposes, made a deed of trust to W. and J. C. Herbert, reciting that Hooe had become surety of Fitzgerald on the bond to the United States and that he purposed obtaining money from the Bank of Alexandria and to draw notes to be endorsed by Hooe whereby the latter might be liable and compelled to pay the same, and that Fitzgerald being desirous of securing and indemnifying Hooe from all damages, costs, and charges which he might at any time thereafter be subject and liable to, by reason of any misconduct of Fitzgerald in the discharge of his duties as collector, or for or on account of ready notes drawn by him, endorsed by Hooe and negotiated at the Bank of Alexandria. The indenture then witnessed that for those purposes and in consideration of the trusts and confidence therein expressed and of one dollar, Fitzgerald bargained and sold to
33 the trustees certain real estate described in said indenture, in trust, to and for the use and purposes mentioned in said indenture and for no other use and purpose whatsoever. Fitzgerald died in December, 1799, and directed by will that his real estate be sold for the payment of his debts. In 1801 the Attorney General of the United States filed a bill in equity against Hooe, the two Herberts, and the executors, widow, and heirs of Col. John Fitzgerald, the collector named above.

At the November term in 1802 the court entered its decree, in which it was recited:

"The objects of the bill filed in this cause were to set aside a deed executed on the 16th of January, 1799, by John Fitzgerald to Wm. Herbert and John C. Herbert, conveying certain property therein mentioned, in trust, for the purpose of indemnifying Robert Townsend Hooe, as indorser of certain notes negotiable in the Bank of Alexandria, and as surety of John Fitzgerald, in his office of collector of the port of Alexandria; to oblige the said trustees to account with the United States for the said real property, and to com-

pel the executors to account for the personal estate of the said John Fitzgerald, and to pay the same to the United States towards the discharge of the balance due from him; and further to restrain and enjoin the said trustee from making sale of the said real property."

The decree then further provided that certain notes negotiated after the deed of trust should be paid out of the proceeds of the sale and balance paid according to the terms of the deed of trust to the United States in part liquidation of the debt due from Fitzgerald to the United States. A writ of error was issued to reverse this decree. It was contended by the United States that Fitzgerald had the right to sell and alienate the property, but it did not follow that he could, by a mortgage or an assignment, prefer a particular creditor to the United States, and that under the statute if a man was unable to pay all his debts and attempted to give a particular preference, his hand should be stopped until the debt due the United States should be satisfied, and if it turned out that he was actually insolvent the United States, and not the individual creditor, should have the preference. That the United States had a right to the whole of Fitzgerald's estate in the first place, and that if it was insufficient to pay the debt, it might resort to Hooe for the whole penalty of the bond,

if necessary. It was contended on the contrary that the debt was
34 bona fide and valid, that it was not invalidated by any statute of the United States. That there was no evidence at the time it was given of the insolvency of Fitzgerald; that although Fitzgerald remained in possession, yet, it being real estate, possession was no mark of fraud and could not deceive or defraud others, because the deed must of necessity be upon record. That Fitzgerald, assuming that he was actually unable to pay all his debts at the time of the execution of the deed of trust, yet, as his property was not divested by act of law, nor by such a voluntary assignment as is contemplated by the act of Congress, the priority of the United States had not attached so as by any possibility to avoid the deed of trust.

Chief Justice Marshall in delivering the opinion of the court said:

"The first point made in this case, by the attorney for the United States, is that the deed of the 16th of January, 1799, is fraudulent as to creditors generally.

The second point for which the plaintiffs contend is that this is a case in which the priority of payment claimed by the United States in cases of insolvency intervenes and avoids the deed."

Upon the first point the Chief Justice said:

"But the difference is a marked one between a conveyance which purports to be absolute, and a conveyance which, from its terms, is to leave the possesison in the vendor. If, in the latter case, the retaining of possession was evidence of fraud, no mortgage could be valid. The possession universally remains with the grantor, until the creditor becomes entitled to his money, and either chooses or is compelled to exert his right. That the grantor is to receive the rents and profits till the grantee shall become entitled to demand the money which the deed is intended to secure is a usual covenant."

Upon the second point he said:

"In construing the statutes on this subject, it has been stated by the court, on great deliberation, that the priority to which the United States are entitled does not partake of the character of a lien on the property of public debtors. This distinction is always to be recollected."

And further:

"If a debtor of the United States, who makes a bona fide
35 conveyance of part of his property for the security of a creditor, is within the act which gives a preference to the Government, then would that preference be in the nature of a lien from the instant he became indebted, the inconvenience of which, where the debtor continued to transact business with the world, would certainly be very great."

The court then construes the term "insolvency" as applied to the facts in the case before it. The second paragraph of the syllabus prepared by the court states:

"A mortgage of part of his property made by a collector of the revenue to his surety in his official bond to indemnify him from his responsibility as surety on the bond, and also to secure him from his existing and future indorsements for the mortgagor as a bank, is valid against the United States, although it turns out that the collector was unable to pay all his debts at the time the mortgage was given, and although the mortgagee knew at the time of taking the mortgage that the mortgagor was largely indebted to the United States."

In view of the facts in this case the statement of the court and its holding, upon the validity of the lien of prior mortgages as against a claim of priority on the part of the United States, can not be regarded in any sense as dictum. With respect to the character and nature of a mortgage the statement of Chief Justice Marshall is illuminating. The Hooe case involved the collection of taxes. The present claims of the United States are based upon indebtedness arising in the course of the conduct of and operation by the United States of a private business under emergency legislation. In the present case the liens of the various mortgages executed by the Minneapolis & St. Louis Railroad Company became attached and fixed many years, in one instance approximately 43 years, prior to the accruing of the debt upon which the claims of the United States are based, and further the Minneapolis & St. Louis at the time of the execution of these mortgages was not insolvent and did not become so until long after the debt due the United States originated. The assertion is made also that the opinion of the court in the Conard case to the same effect as in the Hooe case is also dictum. It may be noted, however, that one of the questions involved in the Conard case and decided by the court was the validity of the lien of a respondentia bond which was in effect a mortgage. The fact that in both the Hooe and Conard cases other

points were passed upon by the court does not eliminate the further fact that the question of the effect of a valid existing lien
36 upon the right of priority given by statute to the United States was also passed upon and decided by the court. Clearly such parts of the decision can not be regarded as dictum.

The case of Conard vs. Atlantic Insurance Company of New York, 1 Pet. 386, is one of the earlier cases dealing with the preferred right of payment by the United States under what is now section 6372 of the United States Compiled Statutes. The case was decided in 1828 and the opinion delivered by Mr. Justice Story. Mr. Justice Johnson in a separate opinion concurred. Daniel Webster was one of the counsel for defendants. This was an action of trespass brought in the Circuit Court of the United States for the District of Pennsylvania by the Atlantic Insurance Company of New York against John Conard, the United States marshal for the District of Pennsylvania, for taking and carrying away certain teas imported from Canton into the port of Philadelphia on board the ships "Addison" and "Superior." There was a plea of general issue and a special justification under a fi. fa. against the goods as the property of Edward Thomson. The facts as they appear by the record were in brief as follows:

On the 21st day of June, 1825, the plaintiffs below lent to Edward Thomson the sum of $21,000.00 upon respondentia by the "Addison," for which a bond was duly executed and delivered to the company. On the 14th of July the plaintiffs also lent to Edward Thomson the sum of $13,960.00 upon respondentia by the "Superior," for which a similar bond and memorandum and corresponding bill of lading and assignment were executed to the lenders. There was an assignment by Edward Thomson to the Atlantic Insurance Company of New York of the bills of lading. On November 19, 1925, Edward Thomson, being very largely indebted to the United States upon duty bonds, made a general assignment of all of his estate to certain persons in trust for his creditors, and on the 13th of March, 1826, he confessed judgment to the United States for one-half million dollars, upon which a fi. fa. was issued on the same day. Both shipments upon the "Addison" and "Superior" were levied upon by the marshal under the fi. fa. on the 15th of March, 1826, on the arrival of the ships, and taken into custody, where they remained until released by bond.

One of the questions involved and the only one pertinent to the present case is that of the right of preferred payment under
37 what is now section 6372, U. S. Comp. Stat. as against the respondentia loan. Mr. Justice Story in the opinion said that the real question in the case is whether the insurance company or the United States are entitled to the teas or their proceeds; the question of the validity of the respondentia bonds were discussed and decided affirmatively. After discusisng the priority statute the court inquires:

"What then is the nature of the priority thus limited and established in favor of the United States? Is it a right which supersedes and overrules the assignment of the debtor as to any property which the United States may afterwards elect to take on execution so as to prevent such property from passing by virtue of such assignment to the assignees? Or is it a mere right of prior payment out of the general funds of the debtor in the hands of the assignee? We are of opinion that it clearly falls within the latter description. The language employed is that which naturally would be employed to express such an intent, and it must be strained from its ordinary import to speak any other."

Justice Story then states:

"Then again it is contended on behalf of the United States that the priority thus created by law, if it be not of itself a lien, is still superior to any lien and even to an actual mortgage on the personal property of the debtor."

The court had previously held that the effect of the statute was not to constitute a lien upon the property in favor of the United States. The court in discussing the nature of a mortgage and the effect of the statutes asserting a priority in payment to the United States, quoted from U. S. vs. Fisher, 2 Cranch. 358, that—

"No bona fide transfer of property in the ordinary course of business is overreached by the statute."

And further:

"That a mortgage is a conveyance of property and passes it conditionally to the mortgagee."

Justice Story then goes on to state that—

"A mortgage is something called a lien for a debt. And so it certainly is, and something more; it is a transfer of the property itself as security for the debt. This must be admitted to be true at law, and it is equally true in equity, for in this respect follows the law. It is therefore only in a loose and general sense that
38 it is sometimes called a lien and then only by way of contrast to an estate absolute and indefeasible. But it has never yet been decided by this Court that the priority of the United States will divest a specific lien attached to a thing, whether it be accompanied by possession or not. Cases of lien, accompanied by possession, are among others: The lien of a ship's owner to detain goods for freight; the lien of a factor on the goods of his principal for balance due him; the lien of an artisan for work and services upon the specific thing. On the other hand, there are liens where the right is perfect, independent of possession, as the lien of a seaman for wages, and the lien of a bottomry holder of the ship for the sum loaned. In none of these cases has it ever been decided that in a conflict of satisfaction out of the thing itself the priority of the United States cut out the lien of the particular creditor."

The court then held that the respondentia bonds as given with the assignment were valid and passed the title in the cause to the

Atlantic Insurance Company of New York. In such cases the court held that the only question that properly arises in the bona fide of the transaction. The holding of the lower court that the United States had no right of priority in payment as against the respondentia loan was affirmed.

Field et al. vs. United States, 9 Pet. 182:

The relative priority of various debtors, including the United States, was in main the subject of this decision. It appears that mortgages had been given by the debtor prior to the accruing of the debt to the United States upon a part of his property which was being sold for the benefit of the creditors. Chief Justice Marshall, who delivered the opinion, said in passing upon relative priorities that—

"The priority of the latter (United States) attached by the laws of the United States, in virtue of the assignment and notice to the syndics of their debts. And it was the duty of the syndics to have made known those debts in their tableau of distribution as having such priority. There is no doubt that the mortgages upon the particular estates sold must be first paid out of the proceeds of the sales of those estates. But if there is any deficiency of the proceeds of any particular estate, to pay the mortgages thereon, the mortgagees thereof can not come in upon the funds and proceeds of the sale of the other estates, except as general creditors."

The prior rights of the United States were also passed upon in the case of Robert Y. Brent vs. Bank of Washington, 10 Pet.
39 594. Robert Brent was the holder of 659 shares of stock in the Bank of Washington and was indebted to the bank as indorser on certain promissory notes. He was also indebted to the United States as paymaster in the Army and made an assignment of his property to satisfy the debt. The assignees, however, did not accept the assignment. Shortly after he died. The bank under a provision of its charter, which gave a lien on the stock held by a debtor for the payment of debts due to them before the transfer of the stock held by a stockholder, insisted on the lien against the claim of priority by the United States, and this claim was sustained by the court. The effect and scope of the statute giving priority to the United States was considered and discussed at length, and the court said in its opinion in passing upon the lien asserted by the bank:

"It has been the uniform construction of this act, and the similar provision in the 65th section of the collection act of 1799, that whether in a case of insolvency, death, or assignment the property of the debtor passes to the assignee, executor, or administrator, the priorty of the United States operating, not to prevent the transmission of the property, but giving them a preference in payment out of the proceeds.

"This preference is in the appropriation of the debtor's estate; so that if, before it has attached, the debtor has conveyed or mort-

gaged his property, or it has been transferred in the ordinary course of business, neither are overreached by the statutes; and it has never been decided that it affects any lien, general or specific, existing when the event took place which gave the United States a claim of priority."

And the court also held that the United States coming into the court of equity for a remedy to enforce a legal right,

"must come as other suitors seeking in the administration of the law of equity, belief, to give which, courts of law are wholly incompetent on account of the legal bar imposed by the bank."

Judge Baldwin in writing the opinion also said in discussing the case:

"It is not difficult in this case to decide what the rules of good equity and conscience require. The banks have lent their money on the name, credit, and stocks of Mr. Brent, before the United
40 States could have any claim of preference. * * * In good conscience there can be no claim more equitable than that of the bank for money lent,"

and remarked that he could see no reason why the United States should be exempted from any fundamental rule of equity. In discussing the ruling in the Conard case, 1 Pet. 386, with respect to the character of the act of the debtor whether divesting his title or creating only a lien with the consequent effect as between the two upon the priority right of the United States said:

"Another rule is settled by these cases, that the priority does not attach to property legally transferred to a creditor on respondentia, though he may hold it subject to an account, equity or trust for the borrower. Such transfer will be protected against the United States, though not an out and out sale in the course of business, so as to divest the equitable as well as the legal interest of the party. Such a transaction approximates to one which merely gives a lien; its object is security, not a sale; it is in law a sale by the shape of the contract and securities, but if the goods were of greater value than the debt due, equity would compel an account for the surplus, considering the whole transaction to have been one of loan and priority merely."

In Beaston vs. Farmer's Bank of Delaware, 12 Pet. 102, it was conceded that the debtor bank was unable to pay all of its debts, but the court held that the United States was not entitled to assert its priority. The Supreme Court in course of the decision said:

"From the language employed in this section, and the construction given to it, from time to time, by this court, these rules are clearly established: First, that no lien is created by the statute; secondly, the priority established can never attach while the debtor continues the owner and in the possession of the property, although he may be unable to pay all his debts; thirdly, no evidence can be received of the insolvency of the debtor until he has been divested of his property in one of the modes stated in the section; and, fourthly, whenever he is thus divested of his property the person who becomes invested with

the title is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property."

In Saving & Loan Society vs. Multnomah County, 169 U. S. 421, it was held that—

41 "Although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest and by way of security for the debt, this interest, like any other interest, legal or equitable, may be taxed to its owner, whether resident or nonresident of the State where the land is situated, without contravening any provision of the United States Constitution."

In the opinion by Mr. Justice Gray the nature of a mortgage is considered, and in connection with the determination of its exact character he said:

"This court has always held that a mortgage of real estate, made in good faith by a debtor to secure a private debt, is a conveyance of such an interest in the land as will defeat the priority given to the United States by act of Congress in the distribution of the debtor's estate."

The case was argued October 29, 1897. Decided March 7, 1898.

In Hutchins vs. King, 68 U. S. 1 Wallace, 53, Mr. Justice Field said in delivering the opinion of the court:

"That the interest of the mortgagee is now generally treated by the courts as owner of real estate only so far as it may be necessary to give him the full benefit of the security."

In the Multnomah case cited above reference is made to an action of ejectment, commenced in the Circuit Court of the United States for the District of Pennsylvania and where Mr. Justice Strong, delivering the unanimous opinion of this court, said:

"It is true that a mortgage is in substance but a security for a debt, or an obligation, to which it is collateral. As between the mortgagor and all others than the mortgagee, it is a lien, a security, and not an estate. But as between the parties to the instrument, or their privies, it is a grant which operates to transmit the legal title to the mortgagee, and leaves the mortgagor only a right to redeem. Courts of equity," he went on to say, "as well as courts of law, have always regarded the legal title to be in the mortgagee until redemption, and bills to redeem are entertained upon the principle that the mortgagee holds for the mortgagor when the debt secured by the mortgagor has been paid or tendered. And such is the law of Pennsylvania. There, as elsewhere, the mortgagee, after breach of the condition, may enter or maintain ejectment for the land."

42 Marshall vs. People of State of New York, 254 U. S. 380.

In this case the priority of the State of New York for an unpaid annual franchise tax was involved. The State asserted that the taxes as they accrued became a lien on the property of the defendant corporation and it was entitled to priority in payment out of the assets of the corporation in the hands of a receiver. The basis of this

claim was the sovereign prerogative existing under the common law and exercised by the State of New York continuously since the Revolution. As to the various classes of creditors affected by this priority with respect to secured creditors the court in its opinion, Mr. Justice Brandeis, said:

"The propriety of allowing to the State a preference as to amounts due for the annual franchise taxes is admitted by the receiver. No question of the relative priority of the State and the United States is involved. Nor does any question arise as to priority of the State over incumbrances. The single question is presented whether the State of New York has priority in payment out of the general assets of the debtor over other creditors whose claims are not secured by act of the parties nor accorded a preference, by reason of their nature, by the State legislature or otherwise."

In this case the court, also in discussing the priority right, of the State of New York, as a sovereign and prerogative right, said:

"At common law the crown of Great Britain, by virtue of a prerogative right, had priority over all the subjects for the payment out of a debtor's property of all debts due it. The priority was effective alike whether the property remained in the hands of the debtor, or had been placed in the possession of a third person, or was in custodia legis. The priority could be defeated or postponed only through the passing of title to the debtor's property, absolutely or by way of lien, before the sovereign sought to enforce his right."

The Supreme Court followed the New York ruling that the State of New York had succeeded to the common-law rights of the crown, and again in discussing the question of priority the court said:

"Whether the priority enjoyed by the State of New York is a prerogative right or merely a rule of administration is a matter of local law * * *." Citing cases.

Case of Jacob Richardson, collector at Oswego, 9 Op. Atty. Gen. 28:

43 1. The act of 1797, which provides that when the estate of a deceased debtor to the United States is insufficient to pay all his debts, the debt due to the Governemnt shall be first satisfied, does not create any lien upon the debtor's property, but merely points out a mode of distribution.

2. The priority of the United States, therefore, can not reach back over any valid lien, whether it be general or specific.

3. Where a collector of customs executed a mortgage upon his real estate to indemnify his sureties, and then died insolvent and in debt to the United States, the mortgage to the sureties is valid and effectual against the United States.

ATTORNEY GENERAL'S OFFICE,
May 16, 1857.

SIR: Jacob Richardson, late collector for the port of Oswego, N. Y., dies in 1854, insolvent, and largely indebted to the United

States. Before his death, and after his default, he executed a mortgage of real estate to his sureties for their indemnity. Have the mortgagees a right to the proceeds of the mortgaged estate in preference to the United States?

By the act of March 3, 1797 (1 Stat. at Large 515), it is provided that when the estate of a deceased debtor to the United States is insufficient to pay all his debts the debt due to the Government shall be first paid and satisfied. This does not create any lien upon the debtor's property, but merely points out a mode of distribution, just as, in most of the States, funeral expenses, servants' wages, and physicians' bills are preferred to other claims. (Fisher vs. Blight, 2 Cr. 358.)

In one case (Theluson vs. Smith, 2 Wheat. 396) it is said that the act of Congress defeats the preference to which a judgment would otherwise be entitled by virtue of its general lien on the debtor's property. This was afterwards pronounced a mere dictum of the judge who delivered the opinion (Conrad vs. The Insurance Co., 1 Peters, 386). It has been distinctly overruled, and by the later cases it seems to be well settled that the priority of the United States will not reach back over any lien, whether it be general or specific. (Brent vs. The Bank, 10 Peters, 596; Clark vs. White, 12 Peters, 182; McLean vs. Rankin, 3 Johnson, 369; The United States vs. Nicholls, 4 Yeates, 251; Wilcocks vs. Waler, 10 S. & R. 380; The United States vs. The Mechanics' Bank, 1 Gilpin, 49.)

44 But the acts of Congress giving the United States priority in the distribution of the effects of a public debtor have never been so construed as to make them displace the specific lien of a mortgage upon land, any more than to invalidate a bona fide sale.

A mortgage to secure future advances which the mortgagee has obliged himself to make or to indemnify against liabilities, as surety or otherwise, which the mortgagee was previously bound to incur, is a good and valid mortgage.

It is useless, however, to discuss the general principles of the question you submit, or to collate cases on the subject which are merely analogous, when there is one in the books decided by the highest authority and directly to the point. In the United States vs. Hooe (3 Cranch, 73) it was held that a mortgage made by a collector of revenue to his surety in his official bond to indemnify him from his responsibility on the bond, and from other liabilities, is valid, although the collector was insolvent and the mortgagee at the date of the mortgage knew him to be largely indebted to the United States.

I am of opinion that, under the circumstances of this case, the United States can not legally claim to be paid out of the proceeds of the mortgaged premises in preference to the mortgagees.

Very respectfully yours, etc.,

J. S. BLACK.

Hon. P. CLAYTON,
Acting Secretary of the Treasury.

United States vs. Canal Bank, Federal Case No. 14715.

Opinion by Story, Chief Justice; it is said in the opinion:

"In the first place whether the United States have any priority or preference in respect to the debts due to them by their debtors over the debts due to private persons so as to entitle them to a priority satisfaction upon any judgments obtained against their debtors out of the property attached before other attaching creditors whose attachments are of an earlier date. In my judgment they have not. * * * The case of Prince vs. Bartlette, 8 Cranch, 431, is directly in point in the case of conflicting attachments and decides that in such a case the private creditor having the priority
45 attachment on the property is entitled to a preference over the subsequent attachment of the United States."

and the syllabus of the decision states,

"the United States have no such priority over other creditors of their debtor as to entitle them to a prior satisfaction, by attachment and levy, over prior attaching creditors."

United States vs. Delaware Insurance Company, Federal Case No. 14942. The opinion in this case was written by Washington, circuit judge, and it holds,

"that if before the right of preference of the United States to be first paid out of the estate of the insolvent as accrued, by the act of insolvency being committed, the debtor has made a bona fide conveyance to properties of a second person or has mortgaged or it has been taken in execution, such property is not liable for the debt due to the United States."

United States vs. Mechanics' Bank, Federal Case No. 15756. Hopkinson, district judge, held in this case that the priority of the United States under section 3466. U. S. Rev. Stat., gave no lien on property under execution when it accrued.

United States vs. Sheriff of Charleston, Federal Case No. 16276.

In construing the various acts giving a preference to the United States, notably that of August 4, 1790, May 2, 1792, and March 3, 1797, the court said:

"I can not find that these acts do in any manner comprehend the present case; there is not a syllable in either of them that can be fairly construed to divest a prior legal lien."

And the case stated in the syllabus as supporting the doctrine that the revenue law of the United States gave a preference over other creditors in several cases but must not be construed as destroying prior legal lien.

United States vs. Duncan, 4 McLean, 607, 25 Fed. Case No. 15003.

In this case, which involved the priorities of the United States under section 3466, U. S. Rev. Stat., the court held that it had been the uniform holding in all cases that the priorities of the United States do not disturb any specific liens nor the perfected lien of a

judgment; that is, it does not supersede a mortgage on land, nor
46 a judgment made perfected by the issue of an execution and a levy on real estate. In the case of a general lien the court held the rule was not so clear. In the course of the litigation through which the United States sought to collect from Duncan, who had become one of the sureties upon one Lin who was receiver of public moneys at Vandalia and who had been in default to a large extent, judgments had been obtained against Duncan. The decree in one of these cases ordered that the real estate of Duncan be sold and the proceeds to be paid to the United States, "first paying prior liens, if any."

United States vs. Griswold et al., 8 Fed. 496.

In this case it was held that a debtor of the United States may assign his property within the meaning of section 3466, U. S. Rev. Stat., by means of judgment, confessed in favor of various persons for amounts equal in the aggregate to the value thereof, and the priority of the United States will thereupon attach to the property and prevail against said judgments but subject to all prior valid liens thereon. One of the liens was a mortgage on some of the real property of the debtor. An attempt was made to establish this transaction as fraudulent but the court said:

"The mortgage is allowed to stand as a valid lien on the property for the amount loaned thereon, with interest, less the amount paid thereon by Griswold—$325.80—and the priority of the United States must be enforced subject thereto."

In the case of Schmidtman vs. Atlantic Phosphate & Oil Corporation, 230 Fed. 769, the court in considering preference rights of employees and laborers established by the wage law of New York over other creditors said:

"In construing a statute like this, it is a safe rule for the Federal courts to follow, by analogy, the construction given by the United States Supreme Court to section 6372, U. S. Comp. Stat. (3466 U. S. Rev. Stat.), originally passed in 1799. (Act March 2, 1899, c. 22, sec. 65.) That section gives to the United States, on the death of an insolvent debtor whose estate is not sufficient to pay 'all debts due from him' a priority of payment, declaring that the 'debts due to the United States shall be first satisfied.' Interpreting this statute literally and upon the theory that a sum due under a mortgage is a debt under the statute, then the courts should have held that the Government's debt is to be satisfied before the debt secured by a mortgage. But the Supreme Court has held otherwise con-
47 sistently from the beginning, having laid down the rule in Conard vs. Atlantic Insurance Company, 1 Pet. 386, 7 L. Ed. 189, in an opinion written by Justice Story, that the statute gives a mere right to prior payment out of the general funds of the debtor and that it does not take precedence over a mortgage debt. It is just as true now as it was then that the Supreme Court has never yet decided that the priority the statute gives divests a specific lien."

Another case might be cited with advantage from the eighth circuit—namely, City and County of Denver vs. Stenger, 295 Fed. 809. The decision was written by Stone, circuit judge. One of the questions decided was that of the preferential status of a claim filed by the city and county of Denver for an arrears of $20,000.00 in the payment of a so-called franchise tax. The exact provision requiring this obligation was included in a franchise passed in 1906 covering the relations between the city and county of Denver and the Denver City Tramway Company and in which it was agreed that the Tramway Company should "pay to the city and county of Denver the sum of one million two hundred thousand dollars ($1,200,000.00) payable in equal installments of $5,000.00 each on the first of each and every calendar month during the life of this franchise." The city and county of Denver claimed that the obligation was money due the sovereign and attendant with the right to preferential payment attaching under the common law, a debt due the sovereign. It was contended that although such payments were not taxes in an exact technical sense, yet they were "in the nature of" taxes and entitled to a priority as such. Upon this point the court decided that the priority of taxes as such due prior to receivership results from lien rights established by statute, and although the receivership proceedings will not be permitted to defeat this statutory priority, yet the lien "will neither be created by implication nor enlarged by construction. We think no priority has been shown based on the theory of a tax or of a payment in the nature of a tax." And again, in answer to the claim of priority of the city and county of Denver as stated above, the court said, on page 816:

"The fourth contention, that the preference sovereign is lost when specific liens exist in advance of the assertion of the preference by the sovereign, is stated too broadly. This preference given by the common law was an inchoate right which attached only from and as of the time when it was properly claimed or asserted
48 and did not affect or take precedence over liens which were fixed upon the property prior to that time and were then in force. Marshall vs. New York, 254 U. S. 380, 384, 41 Sup. Ct. 143, 65 L. Ed. 315; The King vs. Watson, 3 Price 6; Rex vs. Lee, 6 Price 369; excellent note, with citations, 29 L. R. A. 245; also 1 L. R. A. (N. S.) 255, note.

"Applying the above consideration to that portion of the claim accruing before the receivership results in allowance thereof with a preference in payment next following claims carrying liens which had attached at the time appellant filed his application."

Kennebec Box Company vs. O. S. Richardson Corporation, 5 Fed. (2d) 951. Expenses of receivership of insolvent estates have priority over taxes due United States, not secured by lien under Rev. Stat. 3186, notwithstanding section 3466, since there is no fund for payment of insolvent's debts until receivership expenses are paid. The court said:

"For purposes of argument only it may be admitted that out of any fund available for paying the debts of an insolvent debtor United States taxes are to be paid first and in full. But it is elementary that what is available to pay the debts of any debtor must be the property of that debtor."

In this case there were no funds left for the payment of any debts after liquidation of receivership expenses.

In re Caswell Construction Company, Inc., 13 Fed. (2d) 667. This case involved the question in point arising under a petition by mechanics' lienors for an order directing the trustees in bankruptcy to pay their liens before paying the claim of the United States for income taxes. The court held that the mechanic's lien was not subordinate to a later assessed Federal income tax. The case arises under the bankruptcy act, but the discussion of the priority of the United States is general in its scope. The court said:

"Whatever be the law as to the status of taxes of the United States as an attribute of sovereignty or as existing at common law, it is clear that the United States may limit its priority by statute when it does so expressly, and this it has done by sections 3466 and 3186 of the Revised Statutes, Comp. Stat., sec. 6372, 5908, and sections 64a and 67d of the bankruptcy law."

The court then held that as to estates in bankruptcy the bankruptcy act superseded section 3466, Rev. Stat. In discussing generally the question of priority the court said:

49 "A receiver appointed by a Federal court takes the property subject to all liens, property, and privileges existing or accruing under the laws of the States." (Citing cases.)

And again, quoting from United States vs. Lewis, Federal Case No. 15595, where it was said:

"The claim of the Government extends only to that which was the property of the debtor when he became insolvent, and his property is only that in substance, which remains after the satisfaction of liens upon it." Citing Prince vs. Bartlett, 8 Cranch, 431; U. S. vs. Canal Bank, Federal Case No. 14715.)

Upon the effect of a judgment as a lien superseding the priority of the United States as given in section 3466, U. S. Rev. Stat., the case of Thelusson vs. Smith, 2 Wheaton 396, is cited as not superseding that priority.

In Conard vs. The Atlantic Insurance Company of New York, 1 Peters 386, 444, the case of Thelusson vs. Smith, 2 Wheaton 396 was explained and distinguished. In the Conard case Mr. Justice Story, writing the decision, said:

"It is admitted that where any absolute conveyance is made, the property passes so as to defeat the priority; but it is said that a lien has been decided to have no such effect, and that in the eye of a court of equity a mortgage is but a lien for a debt. Thelusson vs. Smith has been mainly relied upon in support of this doctrine. This case has been greatly misunderstood at the bar and will require a particular explanation."

In the course of this explanation and on page 444, Justice Story said:

"The real ground of the decision was that the judgment creditor had never perfected his title by any execution and levy on the Sedgely estate; that he had acquired no title to the proceeds as his property, and that if the proceeds were to be deemed general funds of the debtor, the priority of the United States to payment had attached against all other creditors; and that a mere potential lien on land did not carry a legal title to the proceeds of a sale made under an adverse execution. This is the manner in which this case has been understood by the judges who concurred in the decision; and it is obvious that it established no such proposition as that a specific and perfected lien can be displaced by the mere priority of the United States, since that priority is not of itself equivalent to a lien."

The language of the priority statute the benefit of which is invoked by the United States is that the debts due the United States must first be satisfied out of the estate of the debtor, and the recurring, constant question arises: What is the estate of the debtor? And the answer, as constant and recurring as the question, is, namely, that which the debtor owns at the time of his insolvency. It is clear beyond doubt that the property of others can not be taken to satisfy the debts of the United States, for that would be a confiscation which would not be tolerated now, nor was it tolerated even in the later days of the King's prerogative.

Construction of analogous statutes

The indebtedness claimed to be due and owing the United States of America from the Minneapolis & St. Louis Railroad Company and constituting the basis of the claims (except two, one withdrawn and the other a fine of $100.00) filed by the Government in Consolidated Cause 290 with 299 in equity, originate entirely in financial transactions growing out of the use and operation of the railroad company by the Government during the period of Federal control, so called, or within the time prescribed by law after the end of that control. Such control dependent absolutely upon the emergency legislation with which all are familiar. The acts of Congress under which carriers were controlled by the Government prescribed in great detail their operation, the settlement and adjustment of mutual accounts, with other provisions for the reimbursement of the United States for necessary disbursements through the sale of securities and obligations issued by the carriers and others, and from their net operating income.

It has been held by the Supreme Court of the United States that the priority provisions in favor of the Government to be found in the national bankruptcy act and the old national banking legislation superseded the preference given under section 3466 of the U. S. Rev.

Stat. or 6372, U. S. Comp. Stat. It is urged that such priority is also superseded by the manifold and various provisions to be found in the Federal control legislation which, as already stated, provided in detail for the advancement of moneys and acceptance of securities issued by common carriers in payment.

In order to pass upon this point intelligently a short review of the Federal control legislation will be made.

51 The first provision relative to the subject in question is to be found in the Army appropriation act of August 29, 1916, 39 Stat. L. 645, where the President was authorized and empowered in time of war,

"to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material, and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

March 21, 1918, the original Federal control act was passed and it is entitled,

"An act, to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes."

This act recites in section 1 that the President, having in time of war taken over the possession, use, control, and operation of certain railroads, is authorized to agree with and to guarantee to any such carrier that during the period of such Federal control they shall receive as just compensation an annual sum not to exceed the average annual railway operating income for the three years ending June 30, 1917.

The fourth paragraph of this section provides for—

"maintenance, repairs, renewals, and depreciation,"

and further,

"That the United States may, by deductions or by other proper means and charges, be reimbursed for the cost of any additions, repairs, renewals, and betterments to such properties not justly chargeable to the United States."

By paragraph seven of this section the provisions of the act are extended to competing or connecting railroads, and the law provides that these shall be held and considered as within Federal control as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this act.

Section 6, as amended March 2, 1919, provides for the appropriation of $500,000,000 out of any moneys in the Treasury not otherwise appropriated, which, together with any funds available from any operating income of said carriers, may be used by the President as a revolving fund for the purpose of paying the ex-

52 penses of Federal control, and so far as necessary the amount of just compensation, and to provide terminals, motive power, cars, and other necessary equipment.

It was provided in the second paragraph of this section:

"The President might order betterments, and extensions made, and that from this revolving fund he might advance to a carrier all or any part of the expense of such additions, betterments, or road extensions, such advances to be charged against such carrier and to bear interest at such rate and be payable on such terms as may be determined by the President, to the end that the United States may be fully reimbursed for any sums so advanced."

The President was also authorized to utilize and operate water facilities.

Section 7 provides—

"That for the purpose of providing funds requisite for maturing obligations or for other legal proper expenditures, or for reorganizing railroads in receivership, carriers may during the period of Federal control issue such bonds, notes, equipment trust certificates, stock, and other forms of securities, secured or unsecured by mortgage, as the President may first approve as consistent with the public interest."

It was also provided in this section that the President might out of the revolving fund created by this act purchase for the United States all or any part of such securities, at prices not exceeding par, and might sell such securities whenever in his judgment it was desirable at prices not less than the cost thereof.

"Any securities so purchased shall be held by the Secretary of the Treasury, who shall, under the direction of the President, represent the United States in all matters in connection therewith in the same manner as a private holder thereof."

The first paragraph in section 10 provides—

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control, or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by
53 law; and in any action at law or suit in equity against the carriers no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control."

In section 12 it was provided that the moneys and other properties derived from the operation of the carriers during Federal control

should be the property of the United States, but that unless directed by the President such moneys should not be covered into the Treasury, but should remain in the custody of the same officers, and accounting thereof should be in the same manner and form as before the Federal control and that disbursements therefrom should without further appropriation be made in the same manner as before Federal control.

The last paragraph of this section provided that—

"At such periods as the President may direct, the books shall be closed and the balance of revenues over disbursements shall be covered into the Treasury of the United States to the credit of the revolving fund created by this act. If such revenues are insufficient to meet such disbursements, the deficit shall be paid out of such revolving fund in such manner as the President may direct."

The accounting by the carrier is to be made in the same manner as before Federal control and according to the classification of accounts prescribed by the Interstate Commerce Commission.

Section 15 of the act provided—

"That this act is expressly declared to be emergency legislation enacted to meet conditions growing out of war; and nothing herein is to be construed as expressing or prejudicing the future policy of the Federal Government concerning the ownership, control, or regulation of carriers, or the method or basis of the capitalization thereof."

54 November 19, 1919, an act was passed to provide for the reimbursement of the United States for motive power, cars, and other equipment ordered for railroads and systems of transportation under Federal control, and for other purposes. This act in part authorized the purchase of equipment under equipment trust agreements, so called, and it provided that the President might upon such terms as he should deem advisable receive in reimbursement, cash or obligations of any carrier, or part cash and part such obligations, or in his discretion he might accept for such motive power, cars, or other equipment cash or the shares of stock or obligations secured or unsecured, of any corporation not a carrier organized for the purpose of owning equipment or equipment obligations, or part cash and part such shares of stock and obligations, and that he might transfer to such corporation any obligations of carriers received on account of motive power, cars, or other equipment. It was expressly provided that such agreements and transactions should be

"to the end that title to the motive power, cars, and other equipment so ordered by the President as aforesaid for the carriers may rest in them or their trustees or nominees."

The last section of the act provided that this act is emergency legislation enacted to meet conditions growing out of war and to effectuate said act of March 21, 1918.

February 28, 1920, Congress passed an act terminating Federal control of railroads and systems of transportation. This act provided that Federal control should terminate at 12.01 a. m. March

1, 1920. It provided in section 207 for the refunding of carriers' indebtedness to the United States. In subdivision (b), section 207, it was provided that—

"Any carrier obtaining the refunding of such indebtedness as aforesaid shall give, in the discretion of the President, such security, in such form and upon such terms as he may prescribe."

In subdivision (d) it was provided that—

"Any other indebtedness of such carrier to the United States which might exist after the settlement of accounts between the United States and the carrier and which was then due should be evidenced by notes payable in one year from the termination of Federal control or a shorter period at the option of the carrier, with interest at the rate of 6% per annum" to be secured by such collateral security as the President might deem it advisable to require.

55 Provision was made in subdivision (e) for the extension of obligations.

In section 210, as amended June 5, 1920, provision was made for the making of new loans to railroad companies. In subdivision (a) of this section it was provided—

"For the purpose of enabling carriers by railroad subject to the interstate commerce act properly to serve the public during the transition period immediately following the termination of Federal control, any such carrier may, at any time after the passage of this act and before the expiration of two years after the termination of Federal control, make application to the commission for a loan from the United States to meet its maturing indebtedness, or to provide itself with equipment or other additions and betterments, setting forth the amount of the loan; the term for which it is desired; the purpose of the loan and the use to which it will be applied; the present and prospective ability of the applicant to repay the loan and meet the requirements of its obligations in that regard; the character and value of the security offered; and the extent to which the public convenience and necessity will be served."

Subdivision (b) of this section prescribed the details of the procedure in respect to the application, hearing upon and granting of the loan, and it refers to a hearing and investigation by the Interstate Commerce Commission with or without notice to determine the "prospective earning power of the applicant" and if the character and value of the security offered was such as to furnish reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor and to meet its other bonds in connection with such loan.

Subdivision (c) of the section provided that the Secretary of the Treasury upon the receipt of the certificate provided for from the Interstate Commerce Commission should immediately or as soon as practicable, "make a loan of the amount recommended in such certificate out of any funds in the revolving fund provided for in

this section and accept the security prescribed therefor by the commission."

In subdivision (e) an additional appropriation was made of $300,000,000 as a revolving fund for the purpose of making the loans provided for in section 210 and for paying the judgments, decrees, and awards referred to in subdivision (e), section 206. This section refers as a basis for the loan to the prospective earning
56 power of the applicant, the character and value of the security offered and the applicant's ability to repay the loan within the time fixed therefor. The Interstate Commerce Commission was required, after investigation and hearing, to make findings upon these facts and to give their opinion as to these facts, and it was further required to render an opinion with respect to "reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor and reasonable protection to the United States." It also required a certificate from the commission that the applicant in its opinion was unable to provide itself with the funds necessary for the aforesaid purpose from other sources. The purpose of this section as stated in subdivision (a) was to enable carriers "to properly serve the public during the transition period immediately following the termination of Federal control."

To accomplish the objects stated in the various laws relating to Federal control and its termination, revolving funds were created by Congress consisting of $500,000,000 as provided in the original law and the further sums of $200,000,000 and $300,000,000, making a total of $1,000,000,000 in the revolving fund. In this revolving fund, in addition to the sums so appropriated the surplus income of the carriers was placed as prescribed in the original law.

The Supreme Court said in Mellon, Director General, vs. Michigan Trust Company, that all agree that the rights of the director general rest upon statutory provisions and not upon any sovereign prerogative of the United States and further that in some matters at least under section 10 of the act of 1918 the United States stands exactly as if they were a railroad corporation operating as a common carrier. Very few cases have been decided passing upon the question of priorities of the Government under the Federal control acts. There were some earlier decisions in the Circuit Court of Appeals favorable to such priorities, but upon a substantially similar state of facts these have been reversed by the ruling of the Supreme Court in the Mellon case. Attention will be called to the very few cases thus decided.

Director General of Railroads vs. Kastenbaum, 263 U. S. 25. This is an action brought by Samuel Kastenbaum against the Director General of Railroads, seeking damages for false imprisonment and malicious prosecution. There was a judgment for plaintiff in the New York State courts and certiorari to the Supreme Court of the United States. The judgment of the lower court was
57 affirmed. Section 10 of Federal control act was cited, and in the opinion by Mr. Chief Justice Taft it was held that the

Government under section 10, in a case of false imprisonment, "stands exactly as if it were a railway corporation operating as a common carrier * * *. If in the field of such employment the agent acts without probable cause and an illegal arrest without judicial warrant is made, the corporation is liable for any other act of its agents within the scope of their employment in carrying on the business of a common carrier."

Davis vs. Pringle, 268 U. S. 315. Three cases were involved in this appeal. The first and second were claims for freight, storage, and demurrage proved in bankruptcy proceedings by a Federal agent, for which the agent asserted priority on the ground that such claims arising during Federal control of the railroads in 1918 were debts due to the United States and were preferred by section 3466, U. S. Rev. Stat., and by the bankruptcy act of July 1, 1898, as amended. The third was a claim by the United States for amounts paid by the Postmaster General to the bankrupt for bills of exchange and checks drawn by the bankrupt and unpaid, together with protest fees, etc., as to which priority was asserted on the same grounds. The priority was denied in the first two cases by the Circuit Court of Appeals for the Fourth Circuit Court and not allowed in the third case. The Supreme Court of the United States denied priority in all cases, affirming the decision in the first two and reversing the third. The contention was made on the part of the United States that the bankruptcy act with its amendments was sufficient to entitle the United States to a priority as well as under section 3466, U. S. Rev. Stat. The Supreme Court in its opinion written by Mr. Justice Holmes discussed the change in the bankruptcy law relative to the governmental priorities and commented to the effect that such priorities were larger in the earlier acts and more "comprehensive."

Mr. Justice Holmes then said:

"Public opinion as to the peculiar rights and preferences due to the sovereign has changed. We agree with the view of this point taken by the Chief Justice and Justices Vandevanter and Clarke in United States Shipping Board Emergency Fleet Corporation vs. Wood, 258 U. S. 549, at the time when it was not necessary for the majority to speak upon it. The priority claimed by the United States is not given to it by the law."

58 Mellon, Director General, vs. Michigan Trust Company, 271 U. S. 236. The unanimous opinion of the court was delivered by Mr. Justice McReynolds. The facts as stated in the opinion are briefly as follows: Creditors of the Rathbone Manufacturing Company filed a bill against it in which they alleged its inability to pay lawful debts in due course of business and asked for a receiver. The answer of the corporation admitted the allegations and gave consent to the relief prayed. Thereupon the Michigan Trust Company was appointed receiver and took possession of the property. The Director General of Railroads presented

in the receivership proceedings claims for transportation charges and conversion of a shipment of pig iron. He asked for priority of payment under section 3466, which was denied both in the trial court and in the Circuit Court of Appeals, where the decision is reported under Davis, Director General, vs. Michigan Trust Company, 2 Fed. (2d) 194. The court held first that, as pointed out in the Butterworth-Judson Corporation case, 269 U. S. 504, the things done by the Rathbone Manufacturing Company amounted in substance to a voluntary assignment of all of its property within the meaning of section 3466, U. S. Rev. Stat. The court also held that under Davis vs. Pringle, 268 U. S. 315, as the estate of the Rathbone Manufacturing Company was being administered under the bankruptcy act the claims of the director general would not be entitled to a preference and then said that the decision in the case before the court must turn upon the effect to be given section 10, act of March 21, 1918, chap. 25, 40 Stat. 451. The court then continues as follows:

"All agree that the rights of the director general rest upon statutory provisions, and not upon any sovereign prerogative of the United States. In taking over and operating the railroads the United States acted in their sovereign capacity. Du Pont de Nemours & Co. vs. Davis, 264 U. S. 456, 462, 44 S. Ct. 364, 66 L. Ed. 788. But it was for Congress to determine whether or not claims arising out of such operation should have priority when the debtor made a voluntary assignment. In cases of bankruptcy the statute then in force prohibited any preference.

"In some matters, at least, under section 10, the United States stand exactly as if they were a railroad corporation operating as a common carrier. Director General vs. Kastenbaum, 263 U. S. 25, 28, 44 S. Ct. 52, 68 L. Ed. 146. As said in Davis vs. Pullen (C. C. A.), 277 F. 650, 655:

59 "'There is a certain obvious injustice in giving the United States when engaged in an industrial and commercial venture, even although under war powers, superior rights over other creditors bearing like relations to insolvents.'

"And we think that the indicated purpose of Congress will be best carried out by construing the relevant statutes, so far as may be, iwth the general intent to preserve the substantive rights of all parties concerned as they would have existed but for Federal control.

"Section 10 subjected the director general, as an operator of common carriers, to the laws theretofore applicable to them, except when inconsistent with some provisions of the Federal control acts or an order of the President, and forbade him to defend, in any suit against him as such operator, upon the ground that he was an instrumentality or agency of the Federal Government. In the circumstances presented by this record it is reasonable to say that the statute confined his substantive rights to those which a carrier would have had, and prohibits him, as though he were an actual defendant

in a suit, from resisting the demands of others for equal distribution of the insolvent's assets, under the commonly applied rule, upon the ground that he is an instrumentality of the Federal Government. To permit the claimed preference, we think, would conflict with the spirit and broad purpose of the statute. These become plain enough upon consideration of the just ends which Congress had in view, together with the recent policy revealed by the bankruptcy act in respect of priorities."

Davis, Director General, vs. Michigan Trust Company Case, 2 Fed. (2d) 194. This case was an appeal from a decree of the District Court denying priority for the Government in claim filed by the director general for freight, demurrage, and switching charges in the distribution of the assets, in the hands of a receiver in equity, of the Rathbone Manufacturing Company. The claim of the director general for priority was based upon section 3466 U. S. Rev. Stat., 6372 U. S. Comp. Stat. This case was affirmed in Mellon, Director General, vs. Michigan Trust Company, 271 U. S. 236, 46 Sup. Ct. Rep. 511. The discussion of the question of priority is so thorough and complete that that part of the decision bearing upon it is given in full.

"A final question remains:

(2) Third. Does section 10 of the Federal control act (40 Stat., March 21, 1918, c. 25, Comp. St., 1918 Comp. St. Ann., 60 Supp. 1919, par. 3115¾ j) prevent the director general from asserting Government priority over other creditors on claims arising out of the governmental war operations of the railroads?

It seems to us clear that this section was intended to subject the director general in the operation of the various railway systems of the same rules of substantive civil law that had therefore applied to the carriers. To give the director general, with his manifold claims arising in the ordinary course of business, priority over all other creditors may work grave injustice. In some cases it might result in the director general's taking all or nearly all the assets of the debtor. Such priority would give to the director general a special and privileged position quite inconsistent with the underlying principles of the Federal control act (Director General vs. Kastenbaum, 263 U. S. 25, 44 S. Ct. 52; Davis vs. McCree, 299 F. 142, 146 (C. C. A. 6); and the marked tendencies of our public law; cf. The Pesaro (D. C.), 277 F. 473; The Gloria (D. C.), 286 F. 188. Judicial opinion as well as legislation is examining anew the proper privileges and immunities to be accorded the sovereign State, and in cases not clearly covered by statute or decision the correct solution is not to be found by the application of an abstract formula, but by the most careful consideration of the public needs and the practical requirements of law in the modern industrial community.

Giving due regard to the expression of congressional policy of priority, on the one hand, and a restriction to the rights that the carriers theretofor enjoyed, on the other hand, and on a careful

balancing of conflicting interests, we believe that, especially in the light of the policy of the present bankruptcy act as interpreted by the Chief Justice, supra, priority must be denied the director general in this case. The question of priority is a matter of civil, compensatory law like the question of tort liability, considered in the Kastenbaum case, supra, and is quite different from the question of the nonliability of the director general, dealt with in Missouri Pacific R. R. Co. vs. Ault, 256 U. S. 554, 41 S. Ct. 593, 65 L. Ed. 1087. It is also to be distinguished from the question whether the director general is subject to the Special State and Federal statutes of limitations. Du Pont de Nemours & Co. vs. Davis, 264 U. S. 456, 44 S. Ct. 364, 68 L. Ed. 788; Davis vs. Corona Coal Co., 265 U. S. 218, 44 S. Ct. 552, 68 L. Ed. 987. The fact that the director general has
61 been declared not to have been subjected to the limitation statutes renders it all the more important that the declared legislative policy subjecting him to the usual rules of substantive civil law be given full effect. While our conclusion differs from that expressed in in re Hibner Oil Co., 264 F. 667, 14 A. L. R. 629 (C. C. A. 7), and in re Tidewater Coal Exchange, 280 F. 648 (C. C. A. 2), as well as in Davis vs. Pollen and Davis vs. Miller Link Lumber Co., supra, in none of these cases does the court's attention appear to have been drawn to section 10 of the Federal control act. Affirmed."

Basis of claims conduct of private business

The claims in question are urged for payment by the United States as a sovereign State. And they are based upon the transactions of the Government between itself and a common carrier. The business of transportation is private in its character, and the operations out of which the debt originated were carried on at a time when the Government, under emergency legislation, had forcibly seized the private business of transportation in the United States and was conducting the war in which it was then engaged.

The United States is a sovereign State and as such under all constitutional theories of government is limited in its operations to the exercise of governmental powers and the performance of governmental functions. And as said by the Circuit Court of Appeals in the case of Davis vs. Michigan Trust Company, 2 Fed. (2d), 194:

"Judicial opinion as well as legislation is examining anew the proper privileges and immunities to be accorded the sovereign State, and in cases not clearly covered by statute or decision the correct solution is not to be found by the application of an abstract formula, but by the most careful consideration of the public needs and the practical requirements of law in the modern industrial community."

To determine the scope of the statutes in question giving priority to the United States, the intent and purpose of the statute should be ascertained, and that intent and purpose is determined by the limitations, express and implied, upon the power of the Government

to act. That the original intent of the statute was to apply to the collection of taxes is clearly apparent from the fact that until the few cases were decided arising out of transactions under the Federal control act, substantially all of the cases passing upon the question of priority involved the collection of revenue either directly or
62 indirectly in suits upon bonds given by collectors of revenue to ensure the proper disbursement by revenue officials of the moneys collected in their official capacity. The character of the debt incurred in the present instance is essentially and radically different from that of a tax. It is not denied that the power of taxation is political and governmental in its character, and it is that power most necessary to the existence and maintenance of government and the exercise of various governmental functions which are uniformly recognized as proper. All the decisions recognize the fact that with respect to taxes, either National or State, the government levying them should not be hampered either in their levy or collection. Without citing any one of numberless cases sustaining this rule, reference can be made to one of the Circuit Court of Appeals for the Eighth Circuit, State of Minnesota vs. Central Trust Company, 94 Fed. 244, where the priority of certain personal property taxes levied under the laws of Minnesota was one of the questions determined. The opinion was written by Judge Thayer. Caldwell, Sanborn and Thayer, judges sitting. Judge Thayer in the course of the decision written by him said:

"It has been held frequently that a tax lawfully imposed by the State on its citizens is not an ordinary debt, but is an obligation which by its nature should be regarded as paramount to all other demands against the taxpayer, although the law imposing the tax does not in express terms declare such priority."

And again, he said, after quoting decisions:

"These decisions also express a thought which is generally prevalent in the public mind that taxes levied by the State for its own support are founded upon a higher obligation than other demands. The fact has also been recognized from time immemorial that every sovereignty ought to be armed with the requisite power to enforce the collection of taxes without fail, and to compel the prompt payment of whatever imposts it sees fit to levy for its own support."

An important consideration in determining the asserted priority of the United States is that of the character of the business it engaged in when operating the railroads of the United States. The business of transportation has been regarded and still is so considered as essentially private in its character. This Government is not yet committed to the theory or burden of Government ownership of transportation facilities. It may have assumed the control
63 under its sovereign powers, but the actual operation was not an exercise of either its governmental functions or powers, and the fact that it so engaged in such operation could not change the character of the business from that of a private enterprise to that of a governmental function. Moreover, Congress in the original

act expressly disclaimed in the legislation any such intention as that of taking on Government ownership. The entire situation arose because of the existence of a war. The legislation was of an emergency character and so stated to be. It originated primarily in that provision of the Army appropriation act of August 29, 1916, when Congress declared that the President in time of war was empowered, through the Secretary of War, to take possession and assume control of systems of transportation or any part thereof. For what purpose? "To utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material, and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

The Government engaged in the operation of railroads exactly as if it were their owner, but the character of the business remained the same. The law is well settled as to the rights of a government or a governmental agency when engaged in the conduct of a private and proprietary occupation or business. They are not denied the right of engaging in such a business, but when they do so they are governed by the same rules that govern a private individual or corporation.

As said by Chief Justice Marshall in The United States Bank vs. Planters Bank of Georgia, 9 Wheat. 904:

"It is, we think, a sound principle that, when a government becomes a partner in any trading company it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted * * *. The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs
64 of the corporation than are expressly given by the incorporating act."

And the observation can be made here that it is not necessary for the Government to become a member of a firm or a stockholder in a corporation in order that it carry on and conduct a private commercial business.

The United States Shipping Board Emergency Fleet Corporation was one of the agencies of the Government created by act of Congress to aid in the conduct of the World War. It was incorporated under the general corporation laws of the District of Columbia pursuant to the act of September 7, 1916, for and on behalf of the United States. The question was considered in re Eastern Shore Shipbuilding Corporation, 274 Fed. 893, of whether it was entitled to the governmental priority in bankruptcy cases. The court held that it

was not entitled to such preference, it being organized as a private corporation, and the fact that all of the stock, except five shares held as qualification shares by the directors, were subscribed for and held by the Secretary of the Treasury on behalf of the United States would not give the company any right which might be claimed under the priority sections above cited. It is true that in this case the United States was a stockholder in a corporation engaged in the private venture of transportation upon the high seas, and the court held to the want of priority for this reason. The court quoted with approval the language of Chief Justice Marshall in the case just cited and quoted above. It can not be denied that the same principle would apply if the Government had organized a corporation to take over all of the railroads in the United States. A difference in the means or agency through which a private business is transacted by the Government would not change the rule. The character of the business would remain the same.

And again, in Salas vs. United States, 234 Fed. 842, the question before the court was whether a conspiracy to defraud the Panama Railroad Company was a conspiracy to defraud the United States. It was held that it was not, notwithstanding the fact that the United States owned the whole capital stock of the railroad company and was solely interested in its profits or losses. The court said in this case:

"When the United States enters into a commercial business, it abandons its sovereign capacity and is to be treated like any other corporation."

65 Attention might also be called to various quotations already made in this memorandum from Federal decisions which comment upon the relative priority of the United States and other creditors in insolvency and bankrupt cases. Particular reference can be made also to the language of Mr. Justice McReynolds in delivering the unanimous decision of the Supreme Court in the Mellon vs. Michigan Trust Company case, supra, where he said:

"To permit the claimed preference, we think, would conflict with the spirit and broad purpose of the statute. These become plain enough upon consideration of the just ends which Congress had in view, together with the recent policy, revealed by the bankruptcy act, in respect of priorities."

Federal control acts are self-contained with respect to priority

The point urged can be next considered that the Federal control act with its supplemental legislation in itself provided for the manner in which debts to the United States arising out of the control and operation of carriers and ipso facto superseded any priorities existing under section 3466, U. S. Rev. Stat. The operation of common carriers by the Government under authority of the Federal control acts resulted in the United States engaging in an industrial and commercial venture, private in its character and nature. Public ownership of these facilities is not a part of our governmental policy, and

the original Federal control act expressly disclaimed any bearing in the legislation upon the subject of ownership and control. The acts, moreover, were in their character emergency legislation and so stated in them repeatedly. The transportation act of 1920 is a part of the Federal control legislation and supplementary to the original act. The original act of 1918, as well as the act of 1920, as amended, contained manifold and elaborate provisions for the liquidation of debts due the United States through the purchase or acquirement by the Government of notes, obligations, and other securities of the carriers. Provision was made for the sale of these securities to the public. Unmistakably in view of all existing conditions it was the intention of Congress that expenditures by the Government in connection with the operation of railroads in excess of the securities sold the public should be considered a part of the war disbursements and were obligations to be assumed by the Government. The legislation
66 bears all the imprints of the intention on the part of the Congress that the Government should operate the common carriers of the country as a private owner or operator. Aside from the many inferential provisions, in at least two instances express language is to be found which carries out this conclusion. In section 7 of the original act, which provides for securing funds necessary for maturing obligations or other legal and proper expenditures or for reorganizing railroads in receivership and the issuance by the carrier in liquidation of such advances of bonds, notes, equipment, trust certificates, stock, and other forms of securities either secured or unsecured by mortgage, it was stated that—

"any securities so purchased shall be held by the Secretary of the Treasury, who shall under the direction of the President represent the United States in all matters in connection therewith in the same manner as a private holder thereof."

Section 10 of the original act in connection with litigation and the enforcement of substantive rights stated that—

"In any action of law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

This section has been construed both in the Circuit Court of Appeals and by the Supreme Court of the United States in the case of Mellon Director General vs. Michigan Trust Company, 271 U. S. 234, and in both cases the decision was contrary to the contention of priority urged by the United States. Reference has already been made to these cases.

The national bankruptcy act with its various amendments, which provides for the priorities of debts due the United States, limits these to taxes and by virtue of such limitation eliminates therefore the United States as a prior creditor for other debts due to it from the bankrupt. These acts have been construed repeatedly by the Federal courts as superseding all priorities given in section 3466, U. S. Rev. Stat. The old national banking legislation also contained pro-

visions for the security and payment of debts due the United States from insolvent banks, and likewise repeated decisions of the Federal courts have held that these provisions also superseded section 3466, U. S. Rev. Stat., and limit the priorities accorded the United States to those given in the banking laws. In connection with these
67 decisions, as well as those passing upon the question of priorities in connection with the Federal control acts, the courts have at times made observations upon the status of the United States as a creditor and the attitude that should be taken by the courts when passing upon the relative priorities of the United States as compared with other creditors. Some of these comments may be quoted here.

In Davis, Director General v. Pullen, 277 Fed. 650, a Federal-control case, the court, although holding a priority in favor of the United States, said:

"That the enterprise in which the Government, under its war powers, engaged in taking over and operating the railroads was not an enterprise within the contemplation of Congress when the priority statute was enacted * * *. This argument has weight. There is a certain obvious injustice in giving the United States when engaged in an industrial and commercial venture, even although under war powers, superior rights over other creditors bearing like relations to insolvents."

This comment was quoted with approval in Mellon, Director General v. Michigan Trust Company, 271 U. S. 512, where the court, after quoting the language above from Davis v. Pullen, said:

"And we think that the indicated purpose of Congress will be best carried out by construing the relevant statutes, so far as may be, with the general intent to preserve the substantive rights of all parties concerned as they would have existed but for Federal control."

In Davis, Federal Agent, v. Pringle, 1 Fed. (2d) 860, the court held that by the act of 1898 the law-making power of the United States limited its priorities in bankruptcy to a claim for taxes and said in commenting upon that ruling:

"We hold that in bankruptcy debts due to the United States other than for taxes have no priority over general creditors. No sound principle of public policy can be invoked in support of preference to the Federal Government and to the States over citizens in the collection of ordinary debts. On the contrary, the contractual operations of the Federal Government and of the States have become so extensive and so involved with the business of private citizens that priority to the Federal Government and to the States, except
68 for taxes, would operate as an oppressive hardship on other creditors of bankrupts."

National Bank v. United States, 107 U. S. 445.

This case held that under section 3466 U. S. Rev. Stat. the United States having demands against an insolvent national bank is not entitled to priority of payment out of its assets over other creditors. The syllabus being that—

"the act authorizing the formation of national banks was a separate code by itself and neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates, and giving no preference to any claim, except for moneys to reimburse the United States for advances in redeeming the notes."

Could it not fairly be said that the Federal control acts with respect to the payment and adjustment of accounts and transactions between the carriers and the Government and which so carefully provided means for the reimbursement of the United States and the giving of collateral securities for the protection of the United States was intended to supersede as to priority of payment section 3466. Bearing upon this thought the reasoning of the court in this case and in holding that the banking act superseded section 3466 as to the right of priority, it is interesting to read the opinion and argument of the court. The court said:

"In addition to these conflicting provisions in the banking law, necessarily superseding those of the law of 1797, as to the priority of the United States in the payment of their demands out of the estates of insolvents, there is the significant declaration of the banking law that, for any deficiency in the proceeds of the bonds deposited as security for the circulating notes of the bank, the United States shall have a paramount lien upon all its assets, which shall be made good in preference to all other claims, except for costs and expenses in administering the same. This declaration was unnecessary and quite superfluous if, for such deficiency, the United States already possessed, under the act of 1797, the right to be paid out of the assets of the bank in preference to the claims of other creditors. The declaration considered in connection with the ratable distribution of the assets prescribed after such deficiency is provided for is equivalent to a declaration that no other priority in the distribution of the proceeds of the assets is to be claimed."

69 United States v. State of Oklahoma, 261 U. S. 253.

The question of the relative priority of creditors including the United States, under section 3466 was involved in this case in connection with the alleged insolvency of the State Bank of Guthrie, Oklahoma. Mr. Justice Butler, writing the opinion, said as to the effect and scope of section 3466:

"It has been considered in a number of cases in this court. The claim of the United States to the asserted priority rests exclusively upon the statute. No lien is created by it. It does not overreach or supersede any bona fide transfer of property in the ordinary course of business. It establishes priority which is limited to the particular state of things specified. The meaning of the word 'insolvent' use in the act and of the insolvency therein referred to, is limited by the language to cases where a debtor not having sufficient property to pay all his debts shall make a voluntary assignment."

And it was then held that the State Bank of Guthrie was not insolvent or had not made a voluntary assignment within the meaning of the statute.

In re Stork Contractors' Export Corporation, petition of Director General of Railroads, 285 Fed. 438, Comp. Stat. 6372, p. 438:

"At the time of its bankruptcy a corporation had certain lumber in course of transportation by the Railroad Administration, which unloaded the lumber on its own ground and several months later sold it. Held, that, while demurrage until unloading, and the cost of unloading, were proper claims against the estate, a charge for storage as demurrage and at the demurrage rate after bankruptcy was not allowable as a prior or preferential claim or debt due the United States, under Rev. Stat. 3466 (Comp. St. 6372); also that the director general was chargeable with the fair value of the lumber at the time of bankruptcy."

The court said in sustaining the decision as stated above:

"I can not believe that the act of Congress contemplated to make it possible for the director general in such cases as this to absorb a large portion of the estate of the bankrupt, the assets actually belonging to the creditors of the bankrupt after the payment of just liens, priorities, and costs. I do not believe that the law authorizes or that the courts can sanction such a doctrine."

In re C. J. Rowe & Bros., 18 Fed. (2d) 658, the case involved
70 bankruptcy proceedings and priority of the United States for taxes due. On the particular question of whether a claim for rent for which it was alleged a lien had been acquired through distraint proceedings the court said:

"The specific lien acquired by a landlord by means of a distraint is not such a lien as is 'obtained through legal proceedings' as contemplated by section 67–f of the bankruptcy act, and is not divested by the bankruptcy of the tenant within four months. (Citing cases.) On the other hand, section 3466, Rev. Stat., created no lien, and the priority by it does not attach while the debtor continues the owner and in possession of the property. Citing U. S. v. Oklahoma, 261 U. S. 253; Beaston v. Farmers' Bank, 12 Peters 102. In section 64 the court said that it was intended to create priority of payment in favor of certain classes, who, in the absence of statute, would be general creditors of the bankrupt. It did not contemplate an advantage to the classes given priority as against holders of valid specific liens such as existed at the time the petition was filed."

With these decisions in mind and those construing the Federal control legislation, the general conditions at the time the private character of the business engaged in and the legislation itself, with its elaborate provisions for the issuing of securities and their sale to the public, it certainly will not be a forced or strained construction of that legislation to hold that it was the intent of Congress that in cases like the present one the status of the United States as a creditor should be that on a parity with other general unsecured creditors of the insolvent railroad.

In equity cases Government stands on parity with other litigants

The present receivership is a proceeding in equity, and the rule is that in an equity case the Government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, and the presumptions of law and fact that attend the prosecution of a like action by an individual. When the Government comes into a court of equity asserting a property right, it occupies the position of any and every other suitor. Its rights are precisely the same, no greater or less. This rule is especially pertinent in respect to that phase of the Government claims which involve the determination of rights not dependent upon statutory provisions but upon general equitable principles. The rule above stated
71 is well supported by many reported decisions, a few of which will be referred to. Quoting first from the Eight Circuit Court of Appeals in the case of Hemmer v. United States, 204 Fed. 898, Walter H. Sanborn, presiding judge, said:

"This is a suit in equity. In such a suit the claims of the Government appeal to the conscience of the chancellor with no greater or less force than those of a private individual under similar circumstances."

This decision was affirmed in 241 U. S. 379.

Robert Y. Brent vs. Bank of Washington, 10 Peters 594.

In the course of the decision in this case Mr. Justice Baldwin said on page 614:

"Thus compelled to come into equity for a remedy to enforce a legal right, the United States must come as other suitors, seeking in the administration of the law of equity, relief, to give which courts of law are wholly incompetent on account of the legal bar interposed by the bank. This court, in The United States vs. Mitchel, 9 Peters, 743, have recognized the principle in the common law that though the law gives the King a better or more convenient remedy, he has no better right in court than the subject through whom the property claimed comes to his hands. (Citing cases.) This principle is also carried into all the statutes by which the appropriate courts are authorized to decide and under which they do decide on the rights of a subject in a controversy with the King, according to equity and good conscience between subject and subject."

United States vs. Barker, 12 Wheaton 559, 6 L. Ed. 728:

"The court were of opinion that there was negligence either at Washington or New York as to giving such notice, and that the notice actually given was too late to fix him with the responsibility. The letter from the Treasury Department giving the notice was either not sent in due course of mail to New York or there was negligence at New York in not giving notice there as early as it should have been given after the letter arrived at that city. Whether, therefore, the judge erred or not as to the first part of his charge, in respect to the transmission of the bills from England in a reason-

able time, there was no doubt that the United States had no right to recover on account of the neglect in giving due notice after the return of the bills."

United States vs. Smith, 4 Otto 214, 94 U. S. 115:

"In Clarke's case, 6 Wall. 546 (73 U. S. XVIII, 917), it was
72 decided that the United States were liable for damages resulting from an improper interference with the work of a contractor; and in Smoot's case, 15 Wall. 47 (82 U. S. XXI, 110), that the principles which govern inquiries as to the conduct of individuals, in respect to their contracts, are equally applicable where the United States are a party. The same rules were applied in the case of The Mfg. Co., 17 Wall. 592 (84 U. S. XXI., 715). Here the work was stopped by order of the United States. Smith asked to be released from his contract unless he could go on. This was refused until the expiration of sixty days, when he was allowed to resume. As between individuals, certainly, this would be considered an improper interference, and damages would be awarded to the extent of the loss which was the necessary consequence of the suspension. The United States must answer according to the same rule. In this respect we can not consider this case different in principle from that of Clark (supra)."

See also Mitchel vs. United States, 9 Peters, 711, and

United States vs. Stinson, 197 U. S. 200, where the court held that in an equity case the Government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumption of law and fact that attend the prosecution of a like action by an individual.

United States vs. Ingate, 48 Fed. 251:

"It is well settled that, 'when the United States voluntarily appear in a court of justice, they, at the same time, voluntarily submit to the law, and place themselves upon an equality with other litigants.' U. S. vs. Beebee, 17 Fed. Rep. 40; U. S. vs. Barker, 12 Wheat. 559; Mitchel vs. U. S. 9 Pet. 743; Brent vs. U. S. 10 Pet. 615. 'The principles which govern inquiries as to the conduct of individuals in respect to their contracts are equally applicable where the United States are a party.' U. S. vs. Smith, 94 U. S. 217. In Brent vs. Bank, 10 Pet. 615, the court declares that there is no reason why the United States should be exempted from a fundamental rule of equity subject to which their courts administer their remedy. In 18 Fed. Rep. 278, in the case of U. S. vs. Coal, etc., Co., the court says:

"'It is true, as a general proposition, that when the Government becomes a party to a suit in its own courts it stands upon the same footing with individuals, and must submit to the law as it is
administered between man and man. But this general rule
73 has its limitations, in that neither the defense of the statute of limitations nor that of laches can be pleaded against the United States.'

"These authorities, it seems to me, answer the first question we have been considering in the affirmative."

United States vs. Detroit Timber & Lumber Co., 131 Fed. 668:

"Finally, this is a suit in equity. The equitable claims of the United States appeal to the conscience of a chancellor with the same, but with no greater or less, force than would those of an individual in like circumstances."

United States vs. Clark, 138 Fed. 294:

"As a matter of course, when the Government comes as a suitor into a court of equity, its claims appeal to the chancellor with no greater force than do those of an individual under like circumstances."

Mountain Copper Co. vs. United States, 142 Fed. 625:

"It is the well-established law that, when the Government comes into a court asserting a property right, it occupies the position of any and every other suitor. Its rights are precisely the same; no greater, no less. United States vs. Clark (C. C. A.), 138 Fed. 294; United States vs. Detroit Timber & Lumber Co., 131 Fed. 668, 67 C. C. A. 1; United States vs. Flint, 4 Sawy. 42, Fed. Case No. 15,121; Foster's Federal Practice, sec. 63; United States vs. Barker, 12 Wheat. 559, 6 L. Ed. 728; Mitchel vs. United States, 9 Pet. 743, 9 L. Ed. 283; Brent vs. Bank of Washington, 10 Pet. 615, 9 L. Ed. 547; United States vs. Smith, 94 U. S. 217, 24 L. Ed. 115; Am. & Eng. Enc. of Law (2d Ed.), vol. 4, p. 271."

Diversion funds, if any, an equitable charge only in favor of current supply operating creditors

In an insolvent railroad receivership in disposing of claims two questions ordinarily arise, first, are the claims entitled to a preferential status, and second, if so, is there a fund actual or potential from which they can be paid? The two questions are distinct. They must both be answered affirmatively before such claims can properly be paid. In the present instance there are several sources of payment open to creditors secured and unsecured of the Minneapolis & St. Louis. The corpus of the property as encumbered by established mortgage liens with accrued interest approximating $56,000,000. Cash on hand at the time of the receivership, a negligible amount; net operating income of the receiver, also at the
74 present writing as uncertain and negligible amount; the unmortgaged assets of the company as listed in schedule ten of the master's report in the foreclosure cases and the fund established through the doctrine of diversions as stated in my findings of fact. As against these resources of the company receiver's certificates as a prior obligation over all other debts and liabilities are outstanding in the amount of $1,950,000. The corpus of the property is encumbered by mortgage indebtedness to the extent as stated above. It is improbable that the property of the Minneapolis & St. Louis will sell at foreclosure sale for more than the amount of the mortgaged indebtedness with accrued interest. The only probable source

of payment, therefore, left would be the unmortgaged assets and the so-called diversion fund. The question naturally then arises as to the relative priorities of the United States with respect to such diversions as compared with the priority of the current operating supply creditors. These the master already has found are entitled to a special preference or priority to these funds, and in this respect he has also held that the Government in any event is not entitled to participate or share in the diverted funds which may ultimately be found available for the payment of the preferred supply claimants. In support of this conclusion a brief review of the decisions upon the doctrine of diversions and the character of a fund so designated is necessary.

The subject of diversions with principles of law applicable was considered at length by the master in connection with the claims of the Albia Coal Company and others. A memorandum of authorities will be found on pp. 3115 to 3198, both inclusive, of the printed record and to which reference is made in order to avoid a useless repetition. Summarizing briefly the doctrine of diversions as stated and sustained without exception by all Federal decisions in which the question arose, the following statement of principles may be made:

That a railroad is a peculiar kind of property, in that it owes to the public a duty as a common carrier not devolving upon other private corporations. That there exists a necessity for its continued operation both from its character as a public or common carrier and also as affording to the mortgagees the best security for the debt for which its property has been pledged; that current and necessary supplies for such continued operations are secured upon the assumption and with the expectation of those furnishing
75 such supplies and labor that they will be paid from the current or gross earnings of the road; that there is an implied contract on the part of every railroad mortgagee in accepting his security that the current debts for current supplies and labor made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income; that if the interest is paid on the mortgage debt or disbursements made which enhance the value of securities, these payments constitute a diversion of funds to that extent from the rightful purpose for which they should have been used; and that if the mortgagee chooses upon his own volition and under no compulsion to ask for and secure an equity receivership the court may require him to restore either from receivership income or if necessary from the proceeds of the sale of the pledged property the moneys so diverted in order that the persons who are rightfully and equitably entitled to a payment for their supplies, materials, and the like may be paid.

A better definition of the class of debts for whose benefit the doctrine of diversions was established can not be given than by quoting the language of Judge Walter H. Sanborn, then judge of the Circuit

Court of Appeals for the Eighth Circuit, in the case of Illinois Trust & Savings Bank vs. Doud, 105 Fed. 123, where he said:

"The class of claims which may be awarded a preference in payment over the prior mortgage debt in equity is limited to claims for current expenses incurred in the ordinary course of the operation of the mortgaged property within a limited time before the appointment of a receiver. It does not include claims for money loaned or for material or labor furnished to make necessary beneficial and permanent additions or improvements to the mortgaged property. The broad language of the dicta in Fosdick vs. Schall, that 'necessary operating and managing expenses, proper equipment, and useful improvements' are to be deducted from the current income before the net income out of which the mortgage debt is to be paid arises, has been disapproved and modified, and the class of claims entitled to equitable preference has been limited, by the later decisions of the Supreme Court in (citing cases) to claims incurred for the current expenses of the operation of the mortgaged property in the ordinary course of the business of the mortgagor."

And again, in Chicago & Alton Railroad Company vs. U. S. Mexican Trust Company, 225 Fed. 940, where Judge Sanborn
76 said in defining the class of claims entitled to the benefit of the doctrine:

"It is true and a mortgagee of the property and income of an operating railroad company impliedly agrees that the current expenses of the ordinary operation of the railroad for wages, supplies, materials, and such necessities of operation for six months before the impounding of the income for its benefit may be first paid out of the gross income of operation, before that net income arises which the mortgagee's lien holds fast, and that a court of equity administering railroad property in a foreclosure suit may prefer unpaid claims for such current expenses incurred within six months before the impounding of the income to the claims of bondholders secured by a prior mortgage in its distribution of the surplus income of the property, and that if income has been diverted from the payment of such current expenses, leaving some of them unpaid, to the payment of other debts of the mortgagor not in this preferential class. The court may restore from the proceeds of the corpus of the property the amount thus diverted and apply it to the payment of such current expenses. But if there had been no diversion there can be no restoration, and the amount of the restoration can not exceed the amount of the diversion."

In Moore vs. Donahoo, 217 Fed. 177, Judge Dietrich of the United States Circuit Court of Appeals for the Ninth Circuit, said:

"So with the unsecured claimant: Such equity as he may have flows from the fact that, in the ordinary course of business he has performed labor or furnished necessary supplies to the railroad company with the reasonable expectation of being paid therefor from

certain funds. His power to enforce his rights should not be made contingent upon the possibility that the secured creditor may apply to a court for the appointment of a receiver or for other equitable relief, a circumstance wholly fortuitous, or at least one over which he exercises no control.

"The real basis upon which the preference rests is thought to be the implied understanding on the part of all parties that such debts are to be paid out of the current income before the mortgagee has any claim thereto. Reference to a few of the decisions of the Supreme Court will be sufficient to make this clear."

Texas Company vs. International & Great Northern Railway Company, 237 Fed. 921:

77 This was a decision of the Circuit Court of Appeals for the Fifth Circuit and the court, after citing and quoting from Fosdick vs. Schall, Burnham vs. Bowen, and Carnegie Steel Company cases, infra, referred to the right of the current supply operating creditors for payment and said that they would be receiving then in part, at least, that which in equity belongs to the whole or a part of the general creditors. It was inequitable—

"that the mortgagee should profit in this respect at the expense of supply and labor claimants through the placing of the mortgaged property in the hands of a receiver."

The doctrine of diversions was first stated at length in the case of Fosdick vs. Schall, 99 U. S. 235, where the court said that the business of all railroads was done to a greater or less extent on credit. That this credit was longer or shorter as the necessities of the case required; and that when companies become pecuniarily embarrassed it frequently happened that debts for labor and supplies were permitted to accumulate in order that bonded interest might be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the court said:

"The daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debts."

And further:

"If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do."

The opinion in this case was written by Mr. Chief Justice Waite, and the court then goes on to say that if current operating income has

been used for the payment of bonded interest or the purchase of additional equipment or the making of lasting and valuable
78 improvements, which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership for the discharge of these obligations and that this is not because the creditors to whom such debts are due have a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders, and if they give to one class of creditors that which properly belongs to another the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. And the court further said:

"While ordinarily this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way."

In Burnham et al. vs. Bowen, 111 U. S. 776, the court said:

"The business of every railroad company is necessarily done more or less on credit of all parties understanding that current expenses are to be paid out of current earnings."

And further the court said:

"The business of every railroad company is necessarily done more or less on credit of all parties understanding that current expenses are to be paid out of current earnings. Consequently it almost always happens that the current income is encumbered to a greater or less extent with current debts made in the prosecution of the business out of which the income is derived * * *."

And the court expressly held in that case that diversions of income, "created a charge on the property for whose benefit it had been made,"

and also that,

"under these circumstances we think the debt was a charge in equity on the continuing income as well as that which came into the hands of the court after the receiver was appointed as that before."

79 Reference may be made to only one more case in the United States Supreme Court, that of Southern Railway Company vs. Carnegie Steel Company, 176 U. S. 257, in which the Supreme Court discussed at length the rights of claimants, presenting in a railroad receivership their demands for payment of supplies furnished by them and necessary to enable the railroads to continue its operations. The doctrine of diversions with the equitable rights of current operating supply creditors, as stated in Fosdick vs. Schall, supra, and

Burnham vs. Bowen, supra, was reiterated and followed. In the Carnegie Steel Company case the court expressly said:

"That when current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of any fund thus improperly diverted from their primary use."

In Virginia & Alabama Coal Company vs. Central Railroad & Banking Company, 170 U. S. 355, Mr. Justice White, afterwards Chief Justice, uses in connection with the right of current supply claimants the following language:

"Nor is the equity of a current supply claimant, etc."

The inevitable deduction from all the authorities, a few only of which are cited above, is that the claim of the current supply operating creditors rests in part upon the public character of the railroads; that their continued operation is a matter of public concern; that they can not do business on a cash basis; that temporary credit is essential to the continued operation of the roads; that consequently current supplies, material, and labor must be secured through credit; and that there must be an express or implied agreement that the debt should be paid from the current earnings. The agreement necessarily affects all doing business with a railroad company, and this conclusion logically follows because the current supply operating creditors in all the decisions have been held in equity to displace the mortgage debts and inferentially all others, for it is established beyond question that the mortgage debts are a first lien upon the properties and income pledged. The Supreme Court of the United States, as well as other Federal courts, have held repeatedly that the rights of that class of preferred creditors described above is an equitable charge upon the net income and also upon the corpus to the extent of diversions. The rights of preferred creditors, it has been
80 repeatedly held, extend only to the diversions as established, if any. On this last proposition it is only to refer to Gregg vs. Metropolitan Trust Company, 197 U. S. 183, where the court expressly held that if there were no diversions there could be no restorations by the mortgage creditors. The diverted funds, if any, as ultimately established in this case are those created solely through an application of the doctrine of diversions, which was devised by the courts especially and exclusively for the benefit of current operating supply creditors. It is not asserted, nor can it be claimed, that the debts due the United States are claims of such a character.

The case in which the Government claims are filed was brought originally by creditors of this class upon a bill asking for the impounding of the income through a receivership, the restoration of diversions and for a lien upon the corpus to the extent thereof, and is in foreclosure of the lien so sought to be established. The basis of this suit is the foreclosure of such a lien. Moreover the Government stands in the position of a secured creditor. A deposit as collateral of refunding and extension class "A" bonds was made to secure specified items of its claim, as well as all other indebtedness to the

Government on the part of the Minneapolis & St. Louis Railroad Company.

The case of Brent vs. Bank of Washington, 10 Pet. 596, establishes unanswerably the provision that the priorities of the United States do not displace either a bona fide transfer of properties made by the debtor before insolvency or bankruptcy, a specific vested lien, or an equitable lien or special equity of a claimant against property in the hands of an insolvent at the time of divesture within the meaning of section 3466, U. S. Rev. Stat. It will be remembered that in that case the debts due the bank included not only debts due at the time of the insolvency, but also notes which were then not yet due.

Claim No. 1827 is allowed as a special preferential account entitled to immediate payment out of any funds in the hands of the receiver available for said purpose. This claim is based upon a fine imposed by the United States District Court for the Eastern Division of the Northern District of Illinois on account of the violation of the so-called quarantine act by the Minneapolis & St. Louis Railroad Company. The authorities are uniform in holding that a fine thus im-
imposed for the violation of a statute is in the nature of a pun-
81 ishment, not a debt. Under these conditions it seems clear that the claim should be accorded the preference above allowed.

The point made by counsel for the Government that the earliest cases failing to accord the United States a priority under the statute as against liens were based on the theory that a mortgage was an actual conveyance of the property cannot be sustained. Take the Conard case for illustration. The opinion in this case refers to a decision of that court in Thelusson vs. Smith, 2 Wheat. 396, where the nature of a mortgage was discussed, and then goes on to say that a mortgage is a transfer of the property itself as security for the debt. It is held by the mortgagee as a trust estate and according to the intention of the parties as a qualified estate and security. When the debt is discharged there is a resulting trust for the mortgagor. The term "lien" is used, so the court states, only by way of contrast to an estate absolute and indefeasible. A mortgage, it is held, does not grant such an estate, and in this respect this decision is entirely in harmony with modern authorities.

The master has found the principal only of the claims allowed for the reason that in the original order dated August 20, 1923, it was provided that claims should be proved on the basis of allowance of interest to July 26, 1923, the date of the appointment of the receiver, without prejudice to the right, if any, of the creditors to demand and receive interest accruing thereafter, upon accounts allowed. When passing upon claims of the Chicago Pneumatic Tool Company and others certain of the claimants failed to prove interest, although asking for such an allowance. The master then held that the amount of the interest claimed was as much a matter of proof by the claimant as that of the principal of the claim itself and declined in that instance, as well as others, to allow interest. On exceptions to this ruling Judge Wilbur F. Booth, judge of the Circuit Court of Ap-

peals for this circuit, acting in this case by assignment, on June 3, 1927, overruled the exceptions and said in connection with that ruling:

"The special master has adopted the customary and practical rule of allowing interest only where the claimant has demanded it and has properly proven the amount. In the case of claim No. 854 of the Union Metal Products Company, while interest was demanded there was no proper proof of the amount. Hence no interest was allowed."

82 The record in this case fails to disclose the proof of any specific amount of interest due upon any of the claimes filed by the United States or any of the items thereof.

HOWARD S. ABBOTT,
Special Master.

[File indorsement omitted.]

In United States District Court

Exceptions of United States to report of special master

Filed Aug. 31, 1928

Now comes the United States of America, one of the claimants in the above-entitled cause, and by its counsel states and makes its exceptions to the findings contained in the report of H. S. Abbott, special master, hereinbefore filed on August 13, 1928, as follows:

1. The master finds that the United States of America is not entitled to participate in the fund ultimately established, if any, through the doctrine of diversions.

The United States excepts to this finding on the ground that it is contrary to the specific provision of section 3466, Revised Statutes.

2. The master finds that as to claim No. 2700, items 1, 3, and 4 thereof, and claim No. 4186 the United States is entitled to recover only as a general creditor and "without any preference or priority in payment" (except as to collateral security).

The United States excepts to this finding in that it is erroneous in law, being contrary to the specific provision of section 3466, Revised Statutes, which declares that whenever any person indebted to the United States is insolvent the debts due the United States shall be first satisfied.

3. Exception is taken to the master's finding that counsel for the United States stated at the hearing of its claims that the case of Mellon vs. Michigan Trust Company, 271 U. S. 236, would apply to the two items of claim No. 2700 in the amount of $625,000 each on the ground that such finding erroneously indicates that the United States has relinquished and abandoned its claim to priority with respect to said items, which it has not done nor intended so to do. The discussion to which reference is made in this finding related merely to the possible effect of the decision in said case.

83 4. The master finds that the United States is not entitled to interest on the principal sums proved, for the reason stated that no profit of the actual amount of interest due at the date of the hearing has been submitted.

The United States excepts to this finding on the ground that the right of the Government to interest has been proved, although the exact amount of unpaid interest was not calculated and submitted in evidence. Proofs of claims filed December 21, 1923, and April 28, 1924, contain demands for interest along with the claims for the principal of the respective items. Proof of the Government's claim and right to interest is contained also in the documents already in evidence; that is, the promissory notes evidencing the obligations introduced by the Government on hearing.

Wherefore, the United States prays:

1. That the aforesaid exceptions may be allowed;

2. That the findings of the special master to which the above exceptions are made may be disapproved and reversed;

3. That in the event the court adopts the finding of the special master to which the fourth exception above is made, then that the court grant an opportunity to the United States to submit further proof and calculations of the exact amount of interest due upon said principal sums;

4. That the United States may have such other and further relief as the equities of the case may require and to the court may seem proper.

(Signed) WILLIAM J. DONOVAN,
The Assistant to the Attorney General.
(Signed) ELMER B. COLLINS,
Special Assistant to the Attorney General.

AUGUST 29, 1928.

[File indorsement omitted.]

84 In United States District Court

Exceptions of H. H. Sheriff to report of special master.

Filed Sept. 1, 1928

H. H. Sheriff excepts to that part of report of special master filed August 13, 1928, in respect to the claims of the United States wherein the master finds the defendant railroad company insolvent within the meaning of Federal statutes relating to priority of the United States.

Dated August 31, 1928.

FOWLER, CARLSON, FURBER & JOHNSON,
By RALPH H. COMAFORD,
815–825 New York Life Building, Minneapolis, Minnesota,
Attorneys for H. H. Sheriff.

In United States District Court

Exception of H. H. Sheriff to report of special master

Filed Sept. 1, 1928

H. H. Sheriff excepts to that part of the report of the special master filed August 13, 1928, in respect to claim No. 1827 of the United States, wherein the master finds that the United States is entitled to recover from the Minneapolis & St. Louis Railroad Company and its receiver the sum of one hundred dollars ($100.00) as a special preference claim.

Dated August 31, 1928.

FOWLER, CARLSON, FURBER & JOHNSON,
By RALPH H. COMAFORD,
815–825 New York Life Building, Minneapolis, Minnesota,
Attorneys for H. H. Sheriff.

[File indorsements omitted.]

85 In United States District Court

In equity, consolidated cause No. 299 with 290

GUARANTY TRUST COMPANY OF NEW YORK, AS TRUSTEE, ET AL.,
complainants

vs.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY ET AL.,
defendants

Order and decree approving report of special master

Filed Sept. 6, 1928

CLAIMS OF UNITED STATES

This cause came on for hearing upon exceptions to the report of the special master filed August 13, 1928, upon five claims of the United States involved in this litigation. Exceptions to the report were taken by the United States and by H. H. Sheriff, a creditor of the railroad company. Upon the hearing the exception of H. H. Sheriff to the finding of insolvency by the special master was withdrawn.

The court having heard the arguments of counsel and duly considered the same, together with the special master's report and the memorandum attached thereto, the evidence and exhibits introduced before the special master, and the files and records in the cause, hereby orders that the exceptions to the said report of the special master be, and the same are hereby, each and all, overruled; and the report is hereby approved and confirmed.

It is accordingly further ordered, adjudged, and decreed as follows:

Claim 1827

I. (a) That the claim (master's No. 1827) of the United States against the Minneapolis & St. Louis Railroad Com-' as set forth in the report of the special master is hereby allowed in the principal sum of $100.00.

(b) That the whole of this amount is allowed as a special preference claim, and is ordered to be paid out of the current net operating income of the receiver as a special charge thereon, or from any other funds that may be available for that purpose.

Claim 3268

II. (a) That the claim (master's No. 3268) of the United
86 States against the Minneapolis & St. Louis Railroad Company as set forth in the report of the special master is hereby allowed in the principal sum of $85.35.

(b) That the whole of this amount is allowed as a general claim only, and is ordered to be paid pro rata with other claims of like general status from such funds, if any, in the hands of the court in this cause as may now or hereafter be available for that purpose, without any preference or priority either against the corpus of the mortgaged property or in relation to any other claim or class of claims duly filed in this cause.

Claim 4153

III. That the claim (master's No. 4153) of the United States against the Minneapolis & St. Louis Railroad Company is hereby dismissed, the same having been withdrawn by the United States.

Claim 4186

IV. That the claim (master's No. 4186) of the United States against the Minneapolis & St. Louis Railroad Company as set forth in the report of the special master is hereby adjudged to have no preferential status, this being the only question relative to said claim submitted for determination. All other questions relative to said claim are dependent upon litigation pending in another tribunal, and the present determination as to the status of the claim is without prejudice to the right of the United States to pursue all proper remedies and procedure relative to said other questions.

Claim 2700

V. That the claim (master's No. 2700) of the United States against the Minneapolis & St. Louis Railroad Company as set forth in the

report of the special master is hereby adjudicated and allowed as follows:

1. (a) Item one is allowed in the principal sum of $1,382,000.00, and interest thereon to the date of the receivership in the sum of $26,579.84, making a total of $1,408,579.84.

(b) That the whole of the amount is allowed as a general claim only, and is ordered to be paid pro rata with other claims of like general status from such funds, if any, in the hands of the court in this cause as may now or hereafter be available for that purpose, without any preference or priority either against the corpus of the mortgaged property or in relation to any other claim or class of claims duly filed in this cause.

87 2. Item two in the claimed amount of $386,190.00 (later reduced) is adjudged to be an unmatured claim upon which the United States is not now entitled to any recovery. This determination is without prejudice to the right of the United States to pursue in the future all proper remedies and procedure relative to said claim.

3. (a) Item three is allowed in the principal sum of $625,000.00, and interest thereon to the date of the receivership in the sum of $12,020.55, making a total of $632,020.55.

(b) That the whole of this amount is allowed as a general claim only, and is ordered to be paid pro rata with other claims of like general status from such funds, if any, in the hands of the court in this cause as may now or hereafter be available for that purpose, without any preference or priority either against the corpus of the mortgaged property or in relation to any other claim or class of claims duly filed in this cause.

4. (a) Item four is allowed in the principal sum of $625,000.00, and interest thereon to the date of the receivership in the sum of $12,020.55, making a total of $637,022.55.

(b) That the whole of this amount is allowed as a general claim only, and is ordered to be paid pro rata with other claims of like general status from such funds, if any, in the hands of the court in this cause as may now or hereafter be available for that purpose, without any preference or priority either against the corpus of the mortgaged property or in relation to any other claim or class of claims duly filed in this cause.

5. Item five in the claimed amount of $403,200.00 (later reduced) is made up of a series of unmatured claims upon which the United States is not now entitled to any recovery. This determination is without prejudice to the right of the United States to pursue in the future all proper remedies and procedure relative to said claim.

6. Interest on items one, three, and four of claim 2700 was not allowed by the special master, for the reason that no sufficient proof of interest was made. Upon the present hearing leave was asked by the United States and allowed by the court to offer such proof, and the same was offered and received.

Exceptions are allowed to the United States to the disallowance of any priority in the foregoing order and decree to claim
88 2700, items one, three, and four, and to claim 4186. Exception is also allowed to H. H. Sheriff to the allowance of special preference in the foregoing order to claim 1827.

Dated September 6, 1928.

WILBUR F. BOOTH,
U. S. Circuit Judge, acting by Assignment.

In United States District Court

Memorandum opinion

Filed Sept. 6, 1928

The character and history of the several claims passed upon in the foregoing order and decree, together with the reasons for the allowance or disallowance of the claims or items thereof, are fully set forth in the able and exhaustive report of the special master and memorandum attached thereto. In the conclusions reached therein I fully agree, and I do not deem necessary at this time a further discussion of the questions involved.

BOOTH, *J.*

[File indorsement omitted.]

In United States District Court

Assignment of errors

Filed Sept. 8, 1928

Now comes United States of America, by its attorneys, and, with its petition for appeal hereto prefixed, files its assignment of errors which it avers occurred in the order and decree entered in the above-entitled cause on September 6, 1928, by this court upon claims of the United States of America.

The United States District Court erred:

1. In overruling the exceptions of United States of America to the report of the special master upon claim No. 2700, items one, three, and four thereof, and claim No. 4186.

2. In approving and confirming said report of the special master upon claims of United States of America No. 2700, items one, three, and four thereof, and claim No. 4186.

3. In holding that claim No. 4186 of United States of America has no preferential status.

4. In allowing claim No. 2700, items one, three, and four thereof, as general claims only and in ordering said items to be paid pro rata with other claims of like general status, with-
89 out any preference or priority either against the corpus of the

mortgaged property or in relation to any other claim or class of claims duly filed in this cause.

5. In not adjudging that said claims of United States of America (claim No. 4186, and claim No. 2700, items one, three, and four thereof) are entitled to a preference and priority in payment over and against any and all other claims filed in this cause.

Wherefore United States of America prays that, for the several errors, and each of them, specified above, the decree entered herein on September 6, 1928, be reversed.

WILLIAM J. DONOVAN,
The Assistant to the Attorney General,
ELMER B. COLLINS,
Special Assistant to the Attorney General,
Attorneys for United States of America,
Department of Justice, Washington, D. C.

[File indorsement omitted.]

In United States District Court

Petition for appeal

(Filed Sept. 8, 1928)

Now comes United States of America, one of the claimants in the above-entitled proceedings, and says that on the 6th day of September, 1928, this court entered its order and decree approving the report of the special master upon the claims of the United States and overruling the exceptions filed by the United States of America to said report of the special master.

That in said order and decree certain errors were committed to the prejudice of the United States of America, which errors will more fully appear in detail from the assignment of errors annexed to this petition and filed herewith.

Wherefore United States of America prays that an appeal may be allowed in its behalf, returnable to the United States Circuit Court of Appeals for the Eighth Circuit of the United States, 90-93 for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers, relating to said claims of United States of America, duly authenticated, may be sent to said Circuit Court of Appeals, and that the order and decree aforesaid may be reversed.

Dated September 8, 1928.

WILLIAM J. DONOVAN,
The Assistant to the Attorney General,
ELMER B. COLLINS,
Special Assistant to the Attorney General,
Attorneys for United States of America,
Department of Justice, Washington, D. C.

[File indorsement omitted.]

In United States District Court

Order allowing appeal

(Filed Sept. 8, 1928)

Upon reading and filing the attached petition for appeal and assignment of errors thereto annexed, it is hereby

Ordered that the appeal of the claimant, United States of America, from the order and decree entered in this court on the 6th day of September, 1928, be, and the same is hereby, allowed as prayed.

Dated September 8, 1928.

WILBUR F. BOOTH,
United States District Judge, acting by assignment.

[File indorsement omitted.]

[Citation in usual form showing service on Cook, Nathan & Lehman et al., filed Sept. 8, 1928, omitted in printing.]

94 In United States District Court

Præcipe for transcript by United States

Filed Sept. 8, 1928

To the Clerk of the above-entitled court:

You will please prepare the transcript of the record in the above-entitled cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit under the appeal heretofore taken by United States of America, as appellant, vs. Guaranty Trust Company et al., as appellees, which appeal was allowed by the District Court of the United States for the District of Minnesota, Fourth Division, and you will please include in said transcript the following papers, orders, records, and proceedings on file in said cause re claims of United States of America:

1. Paragraph 10 of bill of complaint filed July 25, 1923, by Minneapolis Steel & Machinery Company.
2. Answer filed by Minneapolis & St. Louis Railroad Company to said bill of complaint.
3. Report of the special master, filed August 13, 1928, upon claims of the United States of America and memorandum attached to said report.
4. Exceptions filed by United States of America to said report of the special master, also all other exceptions to said report filed by any and all parties hereto.
5. Order and decree of court dated September 6, 1928, approving report of special master on said claims of United States, together with the court's memorandum attached thereto.
6. Process on this appeal.

Said transcript is to be prepared as required by law and the rules the United States Circuit [—] of Appeals for the Eighth Circuit d the rules of practice for the courts of equity of the United ates.

WILLIAM J. DONOVAN,
The Assistant to the Attorney General,
ELMER B. COLLINS,
Special Assistant to the Attorney General,
Attorneys for United States of America,
Department of Justice, Washington, D. C.

Service of a copy of the foregoing præcipe is acknowledged this 8th day of September, 1928.

Cook, Nathan & Lehman, O'Brien, Horn & Stringer, attys., Bache Committee; Cadwalader, Wickersham & Taft, Sanborn, Graves & Stringer, attys., Perkins Committee; Cobb, Hoke, Benson, Grause & Faegre, attys., Mpls. Steel & Mach. Co.; Fowler, Carlson, Furber & Johnson, attys., H. H. Sheriff et al.; J. H. Mulally, atty., Great Northern Ry. Co.; Donald Evans, solicitor, M. & St. L. R. R. Co.; M. M. Joyce, counsel for receiver, M. & St. L. R. R. Co.; Davis, Polk, Wardwell, Gardiner & Reed, Winston, Strawn & Shaw, Davis, Severance & Morgan, attys., Guaranty Trust Co.; Larkin, Rathbone & Perry, F. G. Ingersoll, attys., Central Union Trust Co.; Alexander & Green, Doherty, Rumble, Bunn & Butler, solicitors, Bankers Trust Co.; Geller, Rolston & Blanc, Boyesen, Otis, Brill & Faricy, solicitors, Farmers Loan & Trust Co.; White & Case, Kingman, Cross, Morley & Cant, attys., New York Trust Co. and Bennett Committee; C. W. Bunn, atty. for Northern Pac. Ry. Co.; Washburn, Bailey & Mitchell, by C. R. Fowler, attys., for Duluth Boiler Works et al.

[File indorsement omitted.]

In United States District Court

[Title omitted.]

Notice of appeal

Filed Sept. 11, 1928

To Messrs.—

Davis, Polk, Wardwell, Gardiner & Reed, 44 Wall St., New York, N. Y.; Winston, Strawn & Shaw, First Natl. Bank Bldg., Chicago, Ill.; Davis, Severance & Morgan, Merchants Natl. Bank Bldg., St. Paul, Minn., attorneys for Guaranty Trust Company.

Cobb, Wheelwright, Hoke & Benson, 300 Security Bldg., Minneapolis, Minn., attorneys for Minneapolis Steel & Machinery Co.

Washburn, Bailey & Mitchell, Alworth Bldg., Duluth, Minn., attorneys for Duluth Boiler Works, intervenor, et al.

Donald Evans, Equitable Bldg., Des Moines, Iowa, solicitor for the Mpls. & St. L. R. R. Co.

Fowler, Carlson, Furber & Johnson, 817 N. Y. Life Bldg., Minneapolis, Minn., attorneys for H. H. Sheriff, intervenor, et al.

J. H. Mulally, St. Paul, Minn., attorney for Great Northern Ry. Co.

White & Case, 14 Wall Street, New York, N. Y., Kingman, Cross, Morley & Cant, 1010 Security Bldg., Minneapolis, Minn., attorneys for New York Trust Company and Bennett Committee.

Larkin, Rathbone & Perry, 80 Broadway, New York, N. Y., F. G. Ingersoll, 1401 Merchants Natl. Bank Bldg., St. Paul, Minn., attorneys for Central Union Trust Company.

Alexander & Green, 120 Broadway, New York, N. Y., Doherty, Rumble, Bunn & Butler, 1006 Merchants Natl. Bank Bldg., St. Paul, Minn., solicitors for Bankers Trust Company.

Geller, Rolston & Blanc, 22 Exchange Place, New York, N. Y., Boyesen, Otis, Brill & Faricy, Endicott Bldg., St. Paul, Minn., solicitors for the Farmers Loan and Trust Company.

Charles W. Bunn, St. Paul, Minn., solicitor for Northern Pacific Ry. Company.

Cadwalader, Wickersahm & Taft, 40 Wall St., New York, N. Y., Sanborn, Graves & Ordway, Endicott Bldg., St. Paul, Minn., solicitors for Perkins Committee.

Cook, Nathan & Lehman, Trinity Bldg., New York, N. Y., O'Brien, Horn & Stringer, Pioneer Bldg., St. Paul, Minn., solicitors for Bache Committee.

M. M. Joyce, counsel for receiver, Minneapolis & St. Louis Railroad Co., 514 Metropolitan Life Bldg., Minneapolis, Minn.

98 W. H. Bremner, receiver of the M. & St. L. R. R. Co. Transportation Bldg., Minneapolis, Minn.

You will please take notice that the United States of America, claimant in the above-entitled cause, appeals to the United States Circuit Court of Appeals for the Eighth Circuit from the decree of the District Court for the District of Minnesota, Fourth Division, entered on September 6, 1928, in the above-entitled cause.

The reasons for said appeal are fully set forth in the assignment of errors attached hereto.

WILLIAM J. DONOVAN,
The Assistant to the Attorney General
ELMER B. COLLINS,
Special Assistant to the Attorney General
Attorneys for United States of America,
Department of Justice, Washington, D. C.

SEPTEMBER 8, 1928.

STATE OF MINNESOTA,
County of Hennepin, ss:

Elmer B. Collins, being first duly sworn, on oath deposes and says that on, to wit, September 8, 1928, he delivered a true copy of the

above notice of appeal to each of the above named solicitors and attorneys for appellees, with the exception of Washburn, Bailey & Mitchell and Fowler, Carlson, Furber & Johnson.

ELMER B. COLLINS.

Subscribed and sworn to before me this 8 day of September, 1928.

[NOTARIAL SEAL.] M. H. McDERMOTT,
Notary Public, Hennepin County, Minn.

My commission expires Mar. 25th, 1932.

STATE OF MINNESOTA,
County of Hennepin, ss:

A. L. Beeler, being first duly sworn, upon oath deposes and says that on September 11, 1928, he served a true and correct copy
99 of the above notice of appeal on Washburn, Bailey & Mitchell and Fowler, Carlson, Furber & Johnson, by delivering to Mr. C. R. Fowler personally true and correct copies of the hereto attached notice of appeal.

A. L. BEELER.

Subscribed and sworn to before me this 11th day of September, 1928.

[NOTARIAL SEAL.] M. H. McDERMOTT,
Notary Public, Hennepin County, Minn.

My commission expires Mar. 25th, 1932.

(Copy of assignment of errors attached to original.)
[File indorsement omitted.]

In the United States District Court

Præcipe for additional transcript by H. H. Sheriff

Filed Sept. 20, 1928

To the Clerk of the above-entitled court.

In preparing the transcript of the record in the above-entitled cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit under the appeal heretofore taken by United States of America as appellant vs. Guaranty Trust Company et al., as appellees, which appeal was allowed by the District Court of the United States for the District of Minnesota, Fourth Division, you will please include in said transcript, in addition to the papers, orders, records, and proceedings required by the præcipe heretofore filed herein by the United States of America, the following:

1. That certain statement of evidence contained in stipulation dated September 12, 1928, and approved by the above-named court and filed in your office on the 20th day of September, 1928.

Said transcript to be prepared as required by law and the requirements of the United States Circuit Court of Appeals for the Eighth

Circuit and the rules of practice for the courts of equity of the United States.

FOWLER, CARSON, FURBER & JOHNSON,
By RALPH H. COMAFORD
Attorneys for H. H. Sheriff, Intervener.

100 Service of a copy of the foregoing præcipe is acknowleged this 13th day of September, 1928.

Cook, Nathan & Lehman, O'Brien, Horn & Stringer, *Attys., Bache Committee;* Cadwalader, Wickersham & Taft, Sanborn, Graves & Andre, *attys., Perkins Committee;* Cobb, Hoke, Benson, Krause & Faegre, *attys., Mpls. Steel & Mach. Co.;* Washburn, Bailey & Mitchell, by Fowler, Carlson, Furber & Johnson, *attys., Duluth Boiler Works;* Fowler, carlson & Johnson, by Ralph H. Comaford, *attys., H. H. Sheriff et al.;* J. H. Mulally, *attys., Great Northern Ry. Co.;* Donald Evans, *solicitor, M. & St. L. R. R. Co.;* M. M. Joyce, *counsel for receiver, M. & St. L. R. R. Co.;* William J. Donovan, Elmer B. Collins, *attys., United States of America;* C. W. Bunn, *attys., Northern Pacific Ry. Co.;* Davis, Polk, Wardwell, Gardiner & Reed, Davis, Severance & Morgan, Winston, Strawn &
101 Shaw, *attys., Guaranty Trust Co.;* Larkin, Rathbone & Perry, Frederick G. Ingersoll, *attys., Central Union Trust Co.;* Alexander & Green, Doherty, Rumble, Bunn & Butler, *solicitors, Bankers Trust Co.;* Taylor Blanc, Capron & Marsh, Boyesen, Otis, Brill & Faricy, *solicitors, Farmers Loan & Trust Co.;* White & Case, Kingman, Cross, Morley & Cant, *attys., New York Trust Co. and Bennett Committee.*

[File indorsement omitted.]

In United States District Court

[Title omitted.]

Stipulation as to statement of evidence

Filed Sept. 20, 1928

It is hereby stipulated by and between United States of America, appellant in the appeal heretofore taken herein by said United States of America to the United States Circuit Court of Appeals for the Eighth Circuit, and Guaranty Trust Company et al., appellees in said appeal, through their respective attorneys, that the evidence in the above-entitled cause shows, among other things, the following:

That the note in the amount of $386,190.00 upon which was based item 2 of claim #2700 of the United States of America was secured

by deferred lien certificates issued under a certain equipment trust agreement, Series A, lease basis, dated June 1, 1921, executed by the National Railway Service Corporation to the Bankers
102 Trust Company of New York as trustee and that under and by the terms of said agreement there were created two classes of lien certificates, viz: "Prior lien certificates" and "deferred lien certificates," and that the "deferred lien certificates" were deferred to the "prior lien certificates" as to security.

It is further stipulated that the foregoing statement of evidence may be submitted to the above-named court and be by it approved and filed without further notice to any of the parties hereto.

Dated September 12, 1928.

Cook, Nathan & Lehman, O'Brien, Horn & Stringer, attys., Bache Committee; Cadwalader, Wickersham & Taft, Sanborn, Graves & Andre, attys., Perkins Committee; Cobb, Hoke, Benson, Krause & Faegre, attys., Mpls. Steel & Mach. Co.; Washburn, Bailey & Mitchell, by Fowler, Carlson, Furber & Johnson, attys., Duluth Boiler Works; Fowler, Carlson, Furber & Johnson, by Ralph H. Comaford, attys., H. H. Sheriff et al.; J. H. Mulally, atty., Great Northern Ry. Co.; Donald Evans, solicitor, M. & St. L. R. R. Co.; M. M. Joyce, counsel for receiver, M. & St. L. R. R. Co.; William J. Donovan, Elmer B. Collins,
103 attorneys for United States of America; C. W. Bunn, attorneys, Northern Pacific Ry. Co.; Davis, Polk, Wardwell, Gardiner & Reed, Davis, Severence & Morgan, Winston, Strawn & Shaw, attys., Guaranty Trust Co.; Larkin, Rathbone & Perry, Frederick G. Ingersoll, attys., Central Union Trust Co.; Alexander & Green, Doherty, Rumble, Bunn & Butler, solicitors, Bankers Trust Co.; Taylor, Blanc, Capron & Marsh, Boyesen, Otis, Brill & Faricy, solicitors, Farmers Loan & Trust Co.; White & Case, Kingman, Cross, Morley & Cant, attys., New York Trust Co., and Bennett Committee.

Order approving statement of evidence

I hereby approve the foregoing statement of evidence and direct the clerk to file the same.

WILBUR F. BOOTH,
United States Circuit Judge, Acting by Assignment.

104 [Clerk's certificate to foregoing transcript omitted in printing.]

In United States Circuit Court of Appeals, Eighth Circuit

No. 8389

UNITED STATES OF AMERICA, APPELLANT,

vs.

GUARANTY TRUST COMPANY ET AL.

Appeal from the District Court of the United States for the District of Minnesota

Order advancing cause to docket of December term, 1928, etc.

Upon consideration of the stipulation of counsel for the respective parties in this cause for an order forthwith placing
105 this appeal upon the calendar for trial at the December term 1928 of this court notwithstanding the failure to file the transcript of the record from the District Court with the clerk of this court before the close of the docket for the said December term, and for good cause shown, it is now here ordered by this court that this cause be, and the same is hereby, advanced to the calendar of the December term, 1928, of this court and set for hearing at the foot of the call for the week beginning Monday, January 7, 1929.

OCTOBER 26, 1928.

106–111 [Appearances of counsel omitted in printing.]

112 [Minute entry of argument and submission, Jan. 16, 1929, omitted in printing.]

113 In United States Circuit Court of Appeals

Order substituting Kalbach et al., executors, in lieu of appellee, Sheriff, deceased

January 15, 1929

In this cause the death of H. H. Sheriff, an intervener, one of the appellees, is suggested by Mr. H. C. Carlson, one of the attorneys for appellees herein, and upon his application for substitution, opposing counsel being present in court and not objecting, it is ordered by this court that W. H. Kalbach and Clara Sheriff, as executors of the estate of H. H. Sheriff, deceased, be, and they are hereby substituted as appellees in the place and stead of said H. H. Sheriff, deceased.

114 In United States Circuit Court of Appeals,
Eighth Circuit

No. 8389. May term, A. D. 1929

UNITED STATES OF AMERICA, APPELLANT vs. GUARANTY TRUST COMPANY OF NEW YORK, as Trustees, et al., appellees	Appeal from the District Court of the United States for the District of Minnesota

Before VAN VALKENBURGH and COTTERAL, Circuit Judges, and SCOTT, District Judge

Opinion

(Filed May 15, 1929)

VAN VALKENBURGH, Circuit Judge, delivered the opinion of the court.

115 The Minneapolis and St. Louis Railroad Company is in the hands of a receiver appointed in the District Court for the District of Minnesota, July 26, 1923, upon the application of certain creditors.

Subsequently actions were instituted for the foreclosure of mortgages, and these actions were consolidated with the suit instituted by the creditors' bill. These mortgages were made at various dates between 1888 and 1912, and are conceded to be valid and subsisting record liens upon the properties of the railroad mortgagor. During the progress of the receivership, not yet closed, it has been developed that there are numerous preferred creditors—that is to say, those whose claims arose as a current expense of ordinary operation of the railroad, where necessary for the preservation of the road and to the business of the road, were contracted with the expectation and intention of the parties that they were to be paid out of the current earnings of the road, and accrued within six months prior to the appointment of the receiver. In addition there are unsecured and general creditors. This appeal involves the Government's claim of priority over all creditors, secured and unsecured, by virtue of the provisions of section 3466 R. S. (Comp. Stat. 1916, sec. 6372), to wit:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which the debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the

estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

The claims of the United States, appellant, involved herein are four in number and are thus described:

Claim 2700

Item One. This item consists of a loan in the principal amount of $1,382,000 from the Secretary of the Treasury to the Minneapolis & St. Louis Railroad Company under section 210, transportation act, 1920, as amended, and certificate No. 81 of the Inter-
116 state Commerce Commission, evidenced by a promissory note executed by the railroad company on April 1, 1921, due April 1, 1931, with interest at 6 per cent per annum, payable semi-annually.

Item Three. This item consists of a principal sum of $625,000 indebtedness of the railroad to the United States at the termination of Federal control, funded pursuant to the provisions of section 207, transportation act, 1920, evidenced by the railroad company's promissory note acquired by the Director General of Railroads, dated May 27, 1922, with interest at 6 per cent per annum, payable semiannually.

Item Four. This item is also in the principal amount of $625,000 representing further indebtedness of the railroad company to the United States at the termination of Federal control, funded pursuant to the provisions of section 207, transportation act, 1920, and is evidenced by a promissory note executed by the Director General of Railroads, dated April 2, 1923, due on demand with interest at 6 per cent per annum, payable semiannually.

Claim 4186

This claim is in the sum of $292,022.23, together with interest thereon at 6 per cent per annum from May 28, 1921, representing an overpayment of advances to the railroad company under the guaranty provisions of section 209, transportation act, 1920, that amount having been certified by the Interstate Commerce Commission on April 14, 1924, as paid in excess of the amount guaranteed."

The master found against the Government as to the preferential status of all four claims. Upon exceptions, the court sustained the master. With respect to each of items 1, 3, and 4 of Claim 2700, the following language was used:

"The whole of this amount is allowed as a general claim only, and is ordered to be paid pro rata with other claims of like general status from such funds, if any, in the hands of the court in this cause as may now or hereafter be available for that purpose, without any preference or priority either against the corpus of the mortgaged property or in relation to any other claim or class of claims duly filed in this cause."

117 Claim 4186 was thus disposed of:

"The claim (master's No. 4186) of the United States against the Minneapolis & St. Louis Railroad Company as set forth in the report of the special master is hereby adjudged to have no preferential status, this being the only question relative to said claim submitted for determination."

Inasmuch as these rulings finally dispose of the preferential status of these specific liquidated claims presented for allowance and ultimate payment as such, this appeal is not premature. An allowance or disallowance usually settles the status of a claim, even though, in any event, it may not be entitled to immediate payment. City and County of Denver v. Stenger (C. C. A. 8), 295 Fed. 809, 814.

Let us first consider the nature of these governemntal claims and the terms of the statute under which the indebtedness accrued. Item one of claim 2700, as stated, consists of a loan made by the Government to the railroad under the provisions of section 210 of the transportation act of 1920, as amended. Paragraph "A" of section 210 provides as follows:

"For the purpose of enabling carriers by railroad subject to the interstate commerce act properly to serve the public during the transition period immediately following the termination of Federal control, any such carrier may, at any time after the passage of this act and before the expiration of two years after the termination of Federal control, make application to the commission for a loan from the United States, setting forth the amount of the loan and the term for which it is desired, the purpose of the loan, and the uses to which it will be applied, the present and prospective ability of the applicant to repay the loan and meet the requirements of its obligations in that regard, the character and value of the security offered, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the commission may bequire with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of granting the loan applied for and

118 the ability of the applicant to make good the obligation, as the commission may deem pertinent to the inquiry."

Paragraph "B" provides that the commission, after such hearing and investigation, "may certify to the Secretary of the Treasury its findings of fact and its recommendations as to the amount of the loan which is to be made; the time, not exceeding five years from the making thereof, within which it is to be repaid; the character of the security which is to be offered therefor; and the terms and conditions of the loan."

By paragraph "E" $300,000,000 is appropriated to be used as a revolving fund for the purpose of making the loans provided for in this section.

The master details the circumstances under which this claim arose. Six per cent gold bonds of the Minneapolis & St. Louis Railroad Company in the amount of $1,382,000, secured by mortgage known as the Pacific Extension mortgage, matured April 1, 1921. To meet this the United States, under the provisions of section 210, advanced to the railroad $1,382,000, payable in ten years, and on the same date the railroad executed and delivered the promissory note which forms the basis of item one of claim 2700. At the same time $2,377,000 par value of the Minneapolis & St. Louis refunding and extension bonds were deposited as collateral for this loan.

Item three of claim 2700 is thus stated in the findings of the master:

"Item 3 (Government's Exhibit No. 1) of this claim is a promissory note for $625,000.00 given to the Director General of Railroads by the Minneapolis & St. Louis Railroad Company, dated May 27, 1922, due March 1, 1930, and with interest at the rate of 6% per annum, payable semiannually on the 1st days of April and October in each calendar year until payment of said principal sum. This obligation represents indebtedness incurred in the operation of the Minneapolis & St. Louis Railroad Company to the United States of America due at the termination of Federal control and which was funded pursuant to the provisions of section 207 of the transportation act, 1920. This note was secured by a deposit of collateral of $1,500,000.00, principal amount of the refunding and
119 extension mortgage, 50 year, Series 'A,' 5% gold bonds of the Minneapolis & St. Louis Railroad Company, dated January 1, 1912, and due in 1962."

The finding with respect to item four is substantially identical as to origin and security. The date of the note given thereunder was April 1, 1923. These two items arose under the provisions of section 207 of the transportation act of 1920. Paragraph "A" of that section provides that—

"As soon as practicable after the termination of Federal control the President shall ascertain (1) the amount of the indebtedness of each carrier to the United States which may exist at the termination of Federal control, incurred for additions and betterments made during Federal control and properly chargeable to capital account; (2) the amount of indebtedness of such carrier to the United States otherwise incurred; and (3) the amount of the indebtedness of the United States to such carrier arising out of Federal control," in order that certain rights of set-off, together with other adjustments stated, may be made.

Paragraph "B" then provides further as follows:

"Any remaining indebtedness of the carrier to the United States in respect to such additions and betterments shall, at the request of the carrier, be funded for a period of ten years from the termination of Federal control, or a shorter period at the option of the carrier, with interest at the rate of 6 per centum per annum, payable semiannually, subject to the right of such carrier to pay on any

interest-payment day the whole or any part of such indebtedness. Any carrier obtaining the funding of such indebtedness as aforesaid shall give, in the discretion of the President, such security in such form and upon such terms as he may prescribe."

Claim No. 4186 arises under section 209 of the transportation act. By that section for the period of six months after the termination of Federal control, said six months beginning March 1 1920, the United States guaranteed to the carriers in general that their railway operating income for such guaranteed period as a whole should not be less than one-half the average annual railway operating income of such carrier during a test period defined to mean the three years ending June 30, 1917. The terms of this guar-
120 anty varied with respect to the status of the carrier and the relationship existing between it and the Government during the period of Federal control. Paragraph "G" of this section provides—

"The commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated."

Paragraph "H" provides for advancements to the carrier from time to time upon application to the Interstate Commerce Commission of sums not in excess of the estimated amount necessary to make good the guaranty and necessary to enable it to meet its fixed charges and operating expenses; and further, that upon final determination of the amount of the guaranty provided the carrier will repay to the United States any amounts which it may have received from such advancements in excess of the guaranty.

Claim No. 4186, as found by the master, is based upon an alleged indebtedness to the United States, as evidenced by a determination of the Interstate Commerce Commission, in the sum of $292,022.23. It is claimed that an aggregate amount of $2,150,000 was certified for payment as advances under paragraph "H," and that $490,000 additional was certified as a partial payment under paragraph "G." The total amount found by the commission as necessary to make good the guaranty was $2,347,977.77. The difference between the advancements and this latter figure represents the overpayment by the Government in connection with the adjustment of accounts with respect to this guaranty. The formula followed by the commission in arriving at the amount of the guaranty is disputed by the railroad and its receiver, and, therefore, the court below passed only upon the preferential status of the claim and not upon its amount.

To these claims of the United States a twofold defense is presented for consideration: (a) That of the mortgagees, or
121 lienors, and (b) that of the priority creditors, as hereinabove defined, who claim an equitable lien superior to all other demands represented. Of these in their order—

(a) The mortgage trustees, appellees herein, defend upon the ground that the priority claim of the Government, even though applicable in any sense, is inferior to the mortgage lien of the bondholders. They take the position announced in United States v. Duncan, Federal Case 15,003:

"It has been uniformly held in all the cases that the priority of the United States does not disturb any specific lien, nor the perfected lien of a judgment, that it does not supersede a mortgage on land, nor a judgment made perfect by the issue of an execution and a levy on land. Thelluson v. Smith, 2 Wheat. 396; Conrad v. Atlantic Ins. Co., 1 Pet. 286."

To the same effect is United States v. Lewis, Fed. Case 15,595; United States v. Hooe, 3 Cranch. 78; Field v. United States, 9 Peters, 182, 200; Brent v. Bank of Washington, 10 Peters, 596; and 9 Opinions of Attorney General 28. The contention of the Government is that the doctrine announced by the decisions just cited, upon which appellees rely, was dictum merely, and therefore not entitled to weight as a determination by the Supreme Court; further, that these earlier decisions were based upon the status of a mortgage at that time as a conveyance and transfer of the title, whereas the modern view is that the title remains in the mortgagor, the mortgagee having but a lien. It is pointed out that those decisions were handed down during the period between 1805 and 1840; that as early as in 1863 the Supreme Court, in Hutchins v. King, 1 Wall. 53, called attention to the modification of the old rule respecting the effect of a mortgage of real estate; and that in Waterman v. Mackenzie, 138 U. S. 252, the court in 1891 announced the modern rule.

With respect to the first of these propositions it may be said that while, strictly speaking, the rule announced by the Supreme Court in a number of these cases may be regarded as dictum, nevertheless the reannouncement of the doctrine repeatedly over a period of more than a hundred years serves to establish it, not only as the consistent view of the court, but also as a rule of property upon
122 which practical transactions have been and are being based.

The attitude of the Supreme Court has not been changed since the advent of what appellant calls the "modern rule" concerning the effect of a mortgage of real estate. In 1897, in Savings Society v. Multnomah County, 169 U. S. 421, 428, it said:

"This court has always held that a mortgage of real estate, made in good faith by a debtor to secure a private debt, is a conveyance of such an interest in the land as will defeat the priority given to the United States by act of Congress in the distribution of the debtor's estate."

The same principle is recognized in Marshall v. New York, 254 U. S. 380, decided in 1920, and also in Waterman v. Mackenzie, supra, cited by appellant as announcing the modern rule in 1891, to wit, "a mortgage is everywhere considered as passing the title in the land, so far as may be necessary for the protection of the mortgagee, and to give him the full benefit of his security." We deem it to be established beyond dispute that priority claims of the United States, under section 3466 R. S., are subordinate to the lien of a mortgage which has attached before the indebtedness to the Government accrues.

(b) The questions involved in the defense made on behalf of the preferred creditors are serious ones. The priority conferred by section 3466 has been rigidly enforced in the decisions of the Supreme Court and other national courts. It is generally held that the statute is to be liberally construed in favor of the United States, and, together with section 3467, which designates the persons answerable for failure to observe the law requiring priority payment to the United States under prescribed circumstances, means "that a debt due the United States is required first to be satisfied when the possession and control of the estate of the insolvent is given to any person charged with the duty of applying it to the payment of the debts of the insolvent, as the rights and priorities of creditors may be made to appear." Bramwell v. U. S. Fidelity Co., 269 U. S. 483, 490; Price, Receiver, v. United States, 269 U. S. 492; United States v. Butterworth, 269 U. S. 504.

It is further held that, in taking over and operating the railroad systems of the country, the United States did so in its sovereign
123 capacity as a war measure, and may not be held to have waived any sovereign right or privilege unless plainly so provided. DuPont De Nemours & Co. v. Davis, 264 U. S. 456, 462. However, in Mellon v. Michigan Trust Co., 271 U. S. 236, 239, it is said that while "in taking over and operating the railroads the United States acted in their sovereign capacity," nevertheless "all agree that the rights of the director general rest upon statutory provisions and not upon any sovereign prerogative of the United States." Therefore, "it was for Congress to determine whether or not claims arising out of such operation should have priority when the debtor made a voluntary assignment. In cases of bankruptcy the statute then in force prohibited any preference."

The claims in Mellon v. Michigan Trust Company arose out of operation under the Federal control act (40 Stat. 451, 456). The director general presented claims for transportation charges and conversion of a shipment of pig iron, and asked priority of payment. It was held that he was not entitled to this under paragraph 3466 in view of paragraph 10 of the control act, which, so far as pertinent here, reads as follows:

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be

inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law, and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

The court in its opinion said:

"In some matters, at least, under paragraph 10, the United States stands exactly as if they were a railroad corporation operating as a common carrier. Director General v. Kastenbaum, 263 U. S. 25, 28. As said in Davis v. Pullen, 277 Fed. 650, 655, 'there is a certain obvious injustice in giving the United States when engaged in an industrial and commercial venture, even although under war powers, superior rights over other creditors bearing like relations to
124 insolvents.' And we think that the indicated purpose of Congress will be best carried out by construing the relevant statutes, so far as may be, with the general intent to preserve the substantive rights of all parties concerned as they would have existed but for Federal control."

The decision in Mellon v. Michigan Trust Company affirms the judgment of the Circuit Court of Appeals of the Seventh Circuit in Davis v. Michigan Trust Company, 2 Fed. (2d) 194. The controversy arose in a general equity proceeding where, as here, a receiver was appointed under circumstances sufficient to make such appointment an act of bankruptcy. Insolvency in the bankruptcy sense was not alleged, but, as here, insolvency in the sense of section 3466 was present. Neither was the jurisdiction of the bankruptcy court invoked, nor did it attach. In deciding that the director general was not entitled to assert governmental priority over other creditors on claims arising out of governmental operation of railroads, the Circuit Court of Appeals used this language:

"Giving due regard to the expression of congressional policy of priority, on the one hand, and of a restriction to the rights that the carrier theretofore enjoyed, on the other hand, and on a careful balancing of conflicting interests, we believe that, especially in the light of the policy of the present bankruptcy act as interpreted by the Chief Justice, supra, priority must be denied to the director general in this case."

Neither the bankruptcy act nor paragraph 10 of the Federal control act in express terms excludes the application of section 3466 to the case under consideration. The decision was reached by both courts through construction, which gave due regard to the indicated policy and purpose of Congress as revealed in the Federal control act.

We feel that the transportation act continued in force to a large extent the relationships, responsibilities, and obligations created and imposed by the former act and added others essential to the adjust-

ments incidental to the termination of Federal control. It was the announced policy of the United States, as revealed in this act, to see to it that the roads were sustained and that transportation was insured during the period following governmental operation,
125 at which time serious disorganization existed, and the carriers were known to be in a very unstable financial condition. Much in the way of betterments had immediately to be provided. The morale was greatly impaired. Public confidence was in some measure diminished, and it was realized that the railroads could with difficulty, if at all, secure sufficient new capital to meet their necessities. These provisions of the transportation act were intended to supply such as could not be procured from private sources. We think there is great force in the contention that the Government, by thus encouraging private capital to come to the support of the carriers, thrown upon their own resources, at the termination of an extended period of Federal control, and at the close of an exhausting World War, and by inviting credit to be given for current materials and supplies, presumably upon the same terms, security, and protection afforded and long recognized with respect to railroad operations, has placed itself in a position where it is estopped to seek priority over those who have advanced money and furnished supplies under conditions which entitle them to a preferential status.

In a given case it is for Congress to determine whether section 3466 should apply. The Supreme Court, in Mellon v. Michigan Trust Company, held that, under the indicated purpose of Congress as expressed in paragraph 10 of the Federal control act, the United States was not entitled to the priority granted by section 3466. We think the same construction should be accorded to the transportation act. In our judgment this language of the opinion in the Mellon case "that the indicated purpose of Congress will be best carried out by construing the relevant statutes, so far as may be, with the general intent to preserve the substantive rights of all parties concerned as they would have existed but for Federal control," is equally appropriate here. We think, therefore, that the rights of the priority creditors are superior to the claims of appellant. Those rights constitute equitable liens upon the estate to the extent of any net income of the receiver and unmortgaged assets; and, in case of diversion of net operating income, during the six months' period prior to receivership, to the payment of accruing interest on mortgage indebtedness or to capital account expenditure, those preferred rights may extend to the corpus itself. Brent v. The Bank of Washington, 10 Peters, 569; Fosdick v. Schall, 99 U. S. 252; Burn-
126 ham v. Bowen, 111 U. S. 776; Gregg v. Metropolitan Trust Co., 197 U. S. 183; Moore v. Donahoo (C. C. A. 9), 217 Fed. 177; Illinois Trust & Savings Bank v. Doud (C. C. A. 8), 105 Fed. 123; Chicago & Alton R. Co. v. U. S. & Mexican Trust Co. (C. C. A. 8), 225 Fed. 940. And these equitable liens may be enforced independently of foreclosure proceedings. Moore v. Donahoo, supra, l. c. 183.

Holding, as they do, preferred rights under certain conditions over mortgages of record, it would seem illogical that they should be displaced by this governmental claim of priority, which, we think, is clearly inferior to the mortgage liens. These equitable rights attached and were a subsisting charge upon the assets of the railroad before the United States, in any view, was in a position to assert and enforce its claims. Marshall, Receiver, v. People of the State of New York, 254 U. S. 380.

There are other reasons why appellant should not prevail in this action. The Government, in making these loans and advancements as a sequence to its operation of the roads during the war period, engaged in private business quite as substantially as it is held to have done under the Federal contract act. Furthermore, the transportation act provided for the taking of security for loans made and for money advanced, and such security was taken in three of the four transactions under consideration. The act, therefore, is self-contained and sufficient unto itself without reliance upon section 3466 or any other statutory provision. The conditions surrounding these transactions differ in no substantial respect from those occurring in business between private parties, and should be governed by no other rules. United States v. Miller (C. C. A. 8), 28 Fed. (2d) 846, 850.

The decree below adjudged claim 4186 to have no preferential status, and that the three items of claim 2700 should be "without any preference or priority either against the corpus of the mortgaged property or in relation to any other claim or class of claims duly filed in this cause."

Inasmuch as only holders of liens legal and equitable are before us on this appeal, and since it is conceded that the estate will not realize more than enough to discharge the mortgage indebtedness and preferred claims, we find it unnecessary to consider the effect
127 of the decretal order upon general creditors. It follows from what has been said that the decree should be and is affirmed.

128 In United States Circuit Court of Appeals Eighth Circuit

No. 8389

UNITED STATES OF AMERICA, APPELLANT

vs.

GUARANTY TRUST COMPANY OF NEW YORK, AS TRUSTEE; MINNEAPOLIS Steel and Machinery Company; Duluth Boiler Works, Intervener, et al.; Minneapolis and St. Louis Railroad Company, H. H. Sheriff, Intervener, et al.; Great Northern Railway Company; New York Trust Company and Bennett Committee; Central Union Trust Company; Bankers Trust Company; Farmers Loan and Trust Company; Northern Pacific Railway Company; Perkins Committee; Bache Committee; W. H. Bremner, receiver of the Minneapolis and St. Louis Railroad Company; W. H. Kalbach and Clara

Sheriff, as executors of the estate of H. H. Sheriff, deceased, substituted in the place and stead of said H. H. Sheriff, deceased

Appeal from the District Court of the United States for the District of Minnesota

Decree

May 15, 1929

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said District Court in this cause be, and the same is hereby, affirmed without costs to either party in this court.

129 In United States Circuit Court of Appeals Eighth Circuit

Clerk's certificate

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Minnesota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true, and complete copies of the pleadings, record entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the United States of America was appellant and Guaranty Trust Company of New York, as Trustee, et al., were appellees, No. 8389, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the twenty-third day of July, A. D. 1929, a mandate was issued out of the said Circuit Court of Appeals in said cause, directed to the judges of the District Court of the United States for the District of Minnesota.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit at office in the city of St. Louis, Missouri, this ninth day of August, A. D. 1929.

[SEAL.]

E. E. Koch,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

130 In Supreme Court of the United States

Petition for an extension of time within which to file petition for writ of certiorari

Filed Aug. 13, 1929

To the Honorable Willis Van Devanter,
Associate Justice of the Supreme Court of the United States:

Your petitioner, United States of America, respectfully presents this, its application for an extension of time within which to file a petition for a writ of certiorari in this honorable court in the above-entitled cause, and in support thereof presents the following:

I

The case involves the question whether the United States is entitled under section 3466, Revised Statutes, to priority over other creditors in payment of debts due it by the Minneapolis & St. Louis Railroad Company, against which company receivership and foreclosure proceedings were brought, in the course of which the debts due the United States were duly proved as claims against that company.

These claims were based upon a loan for $1,382,000 made to the carrier pursuant to section 210 of the transportation act, 1920; advancements of cash and other indebtedness of the carrier accruing to the Government during Federal control, funded in two notes of $625,000 each, pursuant to section 207 of the same act; and an overpayment by the Government of advances in amount of
131 $292,022.23 to the carrier, upon certificate of the Interstate Commerce Commission, under the guaranty provisions of section 209 of that act. The district court held that the Government claims were entitled to no priority as against (1) claims of mortgage creditors, (2) priority claims in receivership, or (3) claims of general creditors. The Circuit Court of Appeals affirmed, except that it found it unnecessary to determine priority as against general creditors. It is understood that the same questions are involved in the cases of several other railroads, and petitioners therefore believes that it would be desirable to have the law settled by this court.

II

The final decree of the Circuit Court of Appeals for the Eighth Circuit was entered on May 15, 1929, and the time for filing the petition for a writ of certiorari will expire August 15, 1929.

The work on this case has been handled by the antitrust division of the Department of Justice. Owing to the change of administration, there have been an unusually large number of resignations and vacancies in the staff of that division, and there is now but one lawyer at present available for the cases arising under the act to regulate commerce, the transportation act, and the other acts re-

lating to common carriers. This situation, coupled with the exigent requirements of other work in that division, has made it impossible for it to prepare with the necessary care a petition for certiorari. As shown by the opinion below, the record presents a variety of difficult questions. Certain points have also recently been suggested which require study and consideration which it will be impossible to complete prior to the expiration of time on August 15th.

132 In view of the foregoing, your petitioner believes that an additional extension of one month will be necessary for the adequate preparation of the petition.

Wherefore your petitioner respectfully prays that the time within which petition for a writ of certiorari in the above-entitled cause may be filed in this honorable court be extended to and including September 15, 1929.

CHARLES E. HUGHES, Jr.,
Solicitor General.

133 In Supreme Court of the United States

Order extending time within which to apply for writ of certiorari

Filed Aug. 13, 1929

On consideration of the petition of the Solicitor General of the United States in the above-entitled cause, and good cause therefor having been shown,

It is now here ordered that the time within which petition for writ of certiorari may be filed herein be, and the same is hereby, extended until September 17th, 1929.

WILLIS VAN DEVANTER,
Associate Justice of the Supreme Court of the United States.

Dated this 10th day of August, 1929.

134 [File indorsement omitted.]

135 Supreme Court of the United States

Order allowing certiorari

Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 34,533. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 402. The United States of America, petitioner, vs. Guaranty Trust Company of New York et al. Petition for writ of certiorari and exhibit thereto. Filed September 17, 1929. File No. 34,533.

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